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Double Reverse Discrimination in Housing: Contextualizing the *Starrett City* Case

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Double Reverse Discrimination in Housing: Contextualizing the *Starrett City* Case[1]

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LAW students learn how to brief cases in terms of facts, issue, decision, and rationale. Take the following housing discrimination case:
Facts: About 23,000 residents live in an integrated housing complex called Starrett City, built about twenty years ago on a former landfill on the outskirts of the East New York section of Brooklyn. Starrett City maintained integration through racial quotas which limited the percentage of black and hispanic applicants accepted as tenants.
Issue: Whether Starrett City's policy of integration maintenance through quotas violated Section 3604 (a) of the Fair Housing Act ("the Act"), which makes it unlawful "to refuse to rent or otherwise make unavailable or deny, a dwelling to any person because of race, color, or national origin."[2]
Decision: Starrett City acted contrary to the Act and therefore must abandon its integration maintenance policy.
Rationale: The Act embodies an anti-discrimination principle, which Starrett City's use of racial quotas violated.

While law students quickly abandon the tiresome task of briefing each and every case, the mode of analysis lingers on, providing the basic building stones of most legal analyses. Whatever the merits of the method, it has some devastating consequences for understanding attempts to counter discrimination. The method's crisp and clear catego-

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1. The source of the phrase "double reverse discrimination" is Jefferson Morley's article, *Double Reverse Discrimination: Starrett City Achieves Integration Through Preferential Treatment for Whites*, NEW REPUBLIC, July 9, 1984, at 14 [hereinafter *Double Reverse Discrimination*]. The double reverse takes effect by first discriminating in favor of minorities (by allowing them in the housing project) and then disfavoring them (by placing a ceiling on their numbers). *Id.*

2. Pub. L. No. 90-284, §§ 801-19, 901, 82 Stat. 73, 81-90 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1988 & Supp. I 1989)). The Fair Housing Act is also known as "Title VIII of the Civil Rights Act of 1968." Throughout the text it will be referred to as "Title VIII," "Fair Housing Act," or "the Act."

ries decontextualizes by removing the case from its historical, political, economic, and sociological context.

While discrimination, especially in its common everyday manifestations, remains difficult to fully comprehend, efforts to counter discrimination prove even more inscrutable. Numerous writers have tried to reveal the context of discrimination,[3] in all its sordid detail. Far fewer have shed light on the contradictory aspects of policies such as affirmative action, designed to retard the growth of discrimination.[4] Housing developers resort to a number of devices to counter racial discrimination, including strategic site selection, affirmative tenant assignment, and integration maintenance.[5] This Article focuses on an example of an integration maintenance plan—the racial quota employed by Starrett City.

The *United States v. Starrett City Associates*[6] the so-called "paradigm Fair Housing Act case"[7] involved the Federal Government's successful challenge to the housing project's policy of placing a ceiling on the number of minority residents. Paradoxically, although many find that policy repugnant, Starrett City stands virtually alone as one of the most successful examples of integrated federally subsidized housing projects in the country.[8] Few other projects can boast of the stability and longevity that Starrett City maintained. How can a policy that discriminates counteract discrimination?

Almost no legal commentator has come to the defense of Starrett City's integration maintenance policy;[9] most scholars agree with the courts and reject the policy as discriminatory.[10] However, this consensus

3. For a recent compilation on the forms of racism, see generally ANATOMY OF RACISM (D. Goldberg ed. 1990).

4. *Cf.* J. LUKAS, COMMON GROUND (1985) (a detailed description of the affect of busing in Boston on ordinary people from different backgrounds).

5. *See The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Communities*, 42 FORDHAM L. REV. 891, 895-96 (1974).

6. 640 F.Supp. 668 (E.D.N.Y. 1987), *aff'd* 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988).

7. Note, *The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing?*, 55 BROOKLYN L. REV. 197, 227 (1989) [hereinafter Note, *The Legality of Integration Maintenance Quotas*].

8. *See Starrett City*, 840 F.2d at 106 (J. Newman, dissenting).

9. I have found only one defense of Starrett City's integration maintenance plan in the legal literature. *See* Note, *Racial Integration in Urban Public Housing: The Method is Legal, The Time Has Come*, 34 N.Y.L. SCH. L. REV. 349, 374 (1989) [hereinafter Note, *Racial Integration in Urban Public Housing*].

10. *See* Schwemm, *Fair Housing Act: When Good Intentions Aren't Enough*, Legal Times, May 16, 1988, at 19, col. 1. According to Schwemm, "[m]ost outside observers seem to believe that the Starrett City quotas do violate the Fair Housing Act." *Id.*

of condemnation has formed too rapidly; as more factors enter the analysis of the merits of Starrett City's policy, the practice becomes easier to defend.

Attacks on Starrett City's policy, from legal commentators and the courts, fail to take into consideration the contextual conditions under which Starrett City had to operate. This Article proceeds through three stages in order to make the context more apparent. Part I provides a typical exposition of the case, with little background information. Part II opens the floodgate of contextual detail, which proves useful when assessing the case, primarily in Starrett City's favor, in Part III.

However, the Article continues the analysis; rather than rejoicing in a Starrett City victory, the Article ends on a cautionary note. Until society fully embraces a principle, such as anti-subjugation, which directly confronts the foundations of racism, it must remain satisfied with the incomplete, half-hearted, contradictory efforts of policies such as Starrett City's.[11] Refusing to engage in an all out war on racism condemns society to a state of in-betweenness, where efforts to combat racism, by their very nature, become quixotic.

I. DOCTRINAL ANALYSIS

A. *Nature of Doctrinal Analysis*

Legal analysis in Starrett City's policy fits into a genre of reasoning called doctrinal analysis, essentially a more sophisticated version of a law student's case brief. A doctrinal approach analyzes a case in terms of statutory language and legislative intent. In lieu of clear language or inferable legislative intent, and in light of a subset of facts eligible for consideration, the parties and the courts in this case relied on the principles of anti-discrimination, color-blindness, and pro-integration to find ways of resolving the Starrett City dispute.

The following sections contain straightforward doctrinal analysis which dominates legal thinking today.[12] The factual intricacies and his-

11. *Cf.* Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 URB. LAW. 369 (1990) (employs the same principles but comes to very different conclusions in opposing integration maintenance programs). In an earlier article, Goel takes a similar approach to Starrett City, but once again draws different conclusions from those of this Article. *See,* Recent Developments, *Restricting Minority Occupancy to Maintain Housing Integration - United States v. Starrett City Associates 840 F.2d 1096 (2d Cir. 1988), cert. denied 109 S.Ct. 376 (1988),* 24 HARV. C.R.-C.L. L. REV. 561 (1989) [hereinafter Recent Developments].

12. Although doctrinal analysis dominates current legal thinking, it has not gone unchallenged. Individuals within the Critical Legal Studies ("CLS") movement have launched a concerted attack on doctrinal analysis. For a summary of the CLS critique see M. KELMAN, A GUIDE TO CRITICAL

torical background of the case do not have a great deal of value for a doctrinal analysis. In *Starrett City*, one can readily see the misleading nature of a doctrinal approach, by comparing it to an analysis that more fully fleshes out the factual and historical components.[13]

B. *Doctrinal Facts*

The following section describes the small subset of facts upon which the doctrinal analysis rests. Starrett City, the largest integrated housing project in the country, is located on 153 acres, formerly the site of a garbage dump, along Jamaica Bay in southeastern Brooklyn between Canarsie and East New York.[14] Starrett City contains 46 high-rise buildings with 5,881 one to three bedroom units, housing approximately 17,000 residents of 39 different nationalities.[15]

In 1971 the United Housing Foundation abandoned its attempt to develop cooperative apartments, despite a loan from the New York State Housing Finance Agency ("HFA").[16] The Starrett City Housing Corporation later agreed to take over the development as rental housing rather than as cooperative housing.[17] From the beginning, Starrett City has maintained integration through occupancy controls which limit the number of black and hispanic tenants to about 40 percent.[18] As a result of this policy, blacks wait an average of 20 months for a two bedroom apartment whereas whites only have a two month waiting period.[19]

The Attorney General of the United States commenced the suit against the owners and developers of Starrett City on grounds that they

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LEGAL STUDIES (1987). Munger and Seron turn the table on CLS by accusing CLS of engaging in doctrinal analysis. *See* Munger & Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL'Y 257 (1984). They characterize doctrinal analysis as assuming "that neither the political origins of rules nor the way in which decisions may ultimately redistribute benefits or burdens has relevance in a legal decision. . . [and] processes that produce rules and policies in cases are treated as if they do not matter. . . ." *Id.* at 260.

13. At best, this critique of the *Starrett City* case provides inductive proof of the failure of a doctrinal analysis. The Article does not lodge a wholesale critique of doctrinal analysis.

14. Brief for Defendants-Appellant at 6, *Starrett City* (citing Rosenberg Affidavit ("Aff")).

15. Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 2-3, *Starrett City*.

16. United States v. Starrett City Assocs., 660 F. Supp. at 670.

17. *Id.*

18. *See id.* at 671.

19. The District Court noted that "in February 1979, blacks constituted over 47% of the waiting list but occupied fewer than 21% of the Starrett City apartments in June 1979, whereas whites constituting less than 24% of those on the waiting list occupied more than 63% of the apartments. As of October 1985, blacks made up 53.7% of the waiting list but, as of January 1984, occupied only 20.8% of Starrett City apartments." *Id.* at 672. Differential waiting periods proved crucial in the case.

had violated the Fair Housing Act.[20] The government charged Starrett City with violating Section 804, parts (a), (b), (c), and (d) of the Act.[21] The issue was whether the racial quotas used in renting apartments violate provisions of the Fair Housing Act.[22] The United States District Court for the Eastern District of New York granted summary judgment and enjoined Starrett City from using racial quotas.[23] A divided panel of the Second Circuit Court of Appeals affirmed the District Court's decision.[24] The Supreme Court denied Starrett City's petition for certiorari, with Justice White voting to hear the case.[25]

C. *Positions*

As was previously noted, there were three conflicting principles at work in this case: anti-discrimination, color-blindness, and pro-integration. Starrett City defended its policy in terms of the intrinsic worth of integration. The government attacked Starrett City's policy as a blatant violation of the ideal that housing policy should be color-blind. Unable to take refuge in the statutory language or legislative intent, the courts had to choose a principle to provide the foundation for its decision. Instead of opting for one of the principles proposed by the parties, the District Court and the Second Circuit relied on the principle of anti-discrimination. On the one hand, the courts rejected Starrett City's policy on the ground that it failed to live up to the demands of anti-discrimination, according to which innocent victims should not be mistreated because of their race. On the other hand, since they accepted some race-

20. *Id.* at 669.

21. *See id.* at 670. 42 U.S.C. § 3604 (1991) provides in part that:

> [I]t shall be unlawful-
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
>
> (c) To make, print, or publish. . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin. . . .
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

22. *See* United States v. Starrett City Assocs., 640 F. Supp. at 671.

23. *Id.* at 679.

24. United States v. Starrett City Assocs., 840 F.2d 1096 (2d Cir. 1988).

25. United States v. Starrett City Assocs., 488 U.S. 496 (1988).

conscious measures, they could not fully adopt the government's color-blindness principle. While the parties and the courts in this case readily invoked principles, they uniformly failed to offer satisfactory justifications for the principles.

1. Starrett City's *Pro-Integration Argument.* The Starrett City developers argued that the use of ceiling quotas serves as a means for implementing the integration goal of the Fair Housing Act.[26] As a sponsor of the Act, Senator Mondale acknowledged its integration policy:

> I know of no single action we could take which would contribute more to understanding, to peace and justice within our country, and to the moral decency of all Americans than the simple matter of Congress declaring that we have had the last segregation in the sale and rental of living quarters in the United States, and that once and for all we have decided, as a nation, to live together, not separately.[27]

Based in part on Mondale's remarks, Starrett City argued that section 3608 of the Act imposed an affirmative duty to promote integrated residential patterns.[28]

Starrett City also relied on *Otero v. New York Housing Authority*[29]. In *Otero*, the New York City Housing Authority ("NYCHA") relocated mostly "non-white" families in order to clear a site for two buildings.[30] Many of these minority relocated families applied for housing in the newly constructed buildings. NYCHA departed from its own regulation granting priority to former occupants and gave priority to a certain number of white families in order "to prevent racial imbalance in the project and in the surrounding community."[31] The *Otero* Court found NYCHA "obligated to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons."[32] The court recognized that

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26. *See Starrett City*, 840 F.2d at 1100.

27. Brief for Defendants-Appellant at 34, *Starrett City* (quoting statement of Sen. Mondale in 114 CONG. REC. 3422 (1968)).

28. *See* 42 U.S.C. § 3608(d). It states in part that

> [a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

Id.

29. Otero v. New York Housing Authority, 484 F.2d 1122 (2d Cir. 1973).

30. *Id.* at 1124.

31. *Id.* at 1128.

32. *Id.* at 1125. Notice that the Second Circuit in *Otero* allowed for the disadvantaging of some

a public housing authority such as NYCHA has a federal constitutional and statutory duty to promote integration.[33] In light of *Otero*, Starrett City argued that it had an affirmative duty to promote integration.[34] According to Starrett City, the principle of integration should prevail in this case.

2. *Government's Color-Blindness Position.* The Government did not deny that Congress, in passing the Act, had some hope that the legislation would stimulate more integrated living patterns. The Government maintained that the Act's goal was nondiscrimination, not integration.[35] According to this view, instead of forcing integration in housing, Congress opted for the far less draconian measure of "a complete ban on the use of racial criteria in housing matters."[36] The Government also found support for its color-blindness position in remarks of the bill's sponsor, Senator Walter Mondale: "[w]hat this bill does is to make race irrelevant, which is the foundation of this country."[37] Relying on the color-blind approach found in the Fair Housing Act's legislative history, the Government attempted to discredit Starrett City's explicit use of race in its occupancy control mechanism.

Moreover, the Government urged the District Court to narrowly interpret *Otero*. Unlike the NYCHA, the state actor in *Otero*, the developers of Starrett City,

> operate a continuing program of racial discrimination of indefinite duration; they do not employ race-conscious selection to avoid creation of a "pocket ghetto" that would adversely affect a surrounding integrated community; and they take race into account in the selection, rather than the mere assignment of tenants to a particular location and offer rejected tenants no alternative housing.[38]

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minority applicants. The same court refused to allow the minority to be disadvantaged in *Starrett City*. *See* United States v. Starrett City Assocs., 840 F.2d at 1106.

33. *Otero*, 484 F.2d at 1133-34.

34. *Starrett City*, 840 F.2d at 1101.

35. The Government contended that "[r]acial discrimination was the evil Congress intended to eliminate when it enacted Title VIII. Congress expected increases in integrated living patterns only as a desirable and eventual by-product of the absolute ban of discrimination against blacks, whites, and all other persons." Brief for Plaintiff-Appellee at 25, *Starrett City*.

36. *Id.* at 18.

37. *Id.* at 23 (quoting statement of Senator Mondale in 114 CONG. REC. 5643 (1968)).

38. *Id.* at 47. If the Government was seriously concerned that rejected tenants had no alternative, then why did it attempt to upset the consent decree in the earlier case, wherein new opportunities were opened up for rejected tenants at Starrett City and other housing projects? *See infra* note 121 and accompanying text. Ackerman finds providing a housing alternative crucial in order to overcome the constitutional problem of denying a person's rights through ceiling quotas. *See* Acker-

In *Otero*, the agency allowed a preference only initially, in filling up newly constructed housing; Starrett City's preferences were ongoing. Therefore, even if *Otero* was still good law, which the Government doubted, its tentative and temporary integration scheme distinguished it from Starrett City's.

3. *The District Court and "Tipping."* With relatively little analysis, the District Court concluded that Starrett City's differential treatment of minorities violated the Act;[39] the court simply referred to the anti-discrimination purpose of the Act.[40] It distinguished *Otero* from *Starrett City* on grounds that unlike the New York Housing Authority in *Otero*, Starrett City as a private landlord, could not clothe itself with governmental authority.[41] Finally, the court rejected the "tipping" phenomenon as a basis for Starrett City's policy since social scientists could not agree on even a reasonable range for when tipping would occur.[42] Tipping is "a threshold after which there is an acceleration in the rate of white out-movement from a neighborhood"[43] or housing area. Some consider tipping a euphemism for white flight caused by an influx of blacks.[44]

4. *The Court of Appeals and Anti-Discrimination.* The Second Circuit refused to adjudicate the dispute between Starrett City and the government in terms of who had the correct interpretation of the legislative history of the Act.[45] It noted the ambiguity in the sparse legislative history surrounding the adoption of the FHA.[46] Although "quotas promoted Title VIII's integration policy," they also contravened its

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man, *Integration for Subsidized Housing and the Question of Racial Controls*, 26 STAN. L. REV. 245, 294 (1974).

39. United States v. Starrett City Assocs., 660 F. Supp. at 679.

40. *Id.* at 677.

41. *Id.* at 678.

42. *Id.* at 678.

43. Goering, *Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence*, 44 J. AM. INST. PLANNERS 69-78 (Jan. 1978).

44. Tipping "is essentially a racism index." *See* Current Issues, *United States v. Starrett City Associates and the United States v. Yonkers Board of Education: Can More be Done to Remedy Housing Discrimination?*, 4 J. OF LEGAL COMMENTARY 1, 30 (1988) [hereinafter Current Issues].

45. United States v. Starrett City Assocs., 840 F.2d at 1101.

46. The legislative history on the Fair Housing Act is sparse because the legislation passed with only floor debates and no committee hearings. *See* Comment, *Justifying A Discriminatory Effect Under the Fair Housing Act: A Search For the Proper Standard*, 27 UCLA L. REV. 398, 426-27 n.136 (1979) [hereinafter Comment, *Justifying A Discriminatory Effect*].

commitment to color-blindness.[47] Finding no guidance in the legislative history, the Second Circuit turned to analogous provisions in federal law, namely, race-conscious affirmative action principles contained in Title VII of the Civil Rights Act, which bar discrimination in the employment context.[48] Because the Supreme Court previously recognized race-conscious affirmative action plans as not violative of federal constitutional or statutory provisions,[49] the Second Circuit rejected the government's color-blind position opposing all uses of race.[50]

Nonetheless, the Second Circuit found that Starrett City's use of ceiling quotas lacked any of the characteristics of federally sanctioned race-conscious remedies.[51] Unlike constitutionally permissible forms of affirmative action, Starrett City's scheme was not temporary; it was not designed to remedy prior discrimination by Starrett City; and it was a ceiling and not a floor or access quota. Finally, in emphasizing the limited, one-time scheme approved of in *Otero*, the court rejected Starrett City's reliance on that case.[52]

Thus, the Second Circuit explicitly adopted an anti-discrimination policy, which permitted race-conscious remedies only under very limited conditions. However laudable the goal of integration, the court rejected it when the goal placed a burden on the very people it was supposed to benefit.

5. *The Dissent and Integration.* Judge Jon O. Newman, in dissent, argued that the purpose behind the Act was to end segregated housing, not to ban integrated housing.[53] In Newman's view, Starrett City did not act contrary to the purpose of the statute because rather than promoting segregated housing, it maintained integrated housing.[54] The Act, according to Newman, was never intended as a weapon to undo "one of the most successful examples in the nation of racial integration in

47. The Second Circuit discussed the Act's underlying "color-blindness" policy in terms of an "antidiscrimination" policy. *Starrett City*, 840 F.2d at 1101.

48. *Id. See also* Title VII of the Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000(e).

The Supreme Court has accepted access quotas to remedy employment discrimination. *See* United States v. Paradise, 480 U.S. 149 (1987) (upholding a one-black-for-each-white promotion scheme).

49. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding a voluntary affirmative action plan against the claim that it violated Title VII).

50. United States v. Starrett City Assocs., 840 F.2d. at 1101.

51. *Id.* at 1102.

52. *Id.* at 1103.

53. *Id.* at 1105 (Newman, J., dissenting).

54. *Id.* at 1106.

housing."[55]

Judge Newman also questioned the majority's differentiation between the scheme approved of in *Otero* and Starrett City's policy because he believed that nothing in the Act supported the majority's use of policy duration as definitive.[56] Accordingly, even if the duration of Starrett City's policy were determinative, Starrett City was still entitled to a trial.[57] Judge Newman acknowledged the controversial nature of a policy that denied minorities an equal opportunity to access rental housing. However, he also found "a substantial argument against forcing an integrated housing complex to become segregated."[58]

D. *Critique*

A doctrinal analysis proves unsatisfactory in this case on its own terms. Neither statutory language nor legislative history provide a clear-cut adjudication of the case; the statutory language of the Fair Housing Act and the legislative intent provide no compelling answer as to the validity of integration maintenance.

Section 3604(a) of the Fair Housing Act prohibits discriminatory refusals to sell, to rent, and to negotiate for housing.[59] Starrett City did not engage in the prohibited conduct of refusing to rent or negotiate with minorities. However, another substantive provision, section 3604(a) makes it unlawful to "otherwise make unavailable or deny" a dwelling on discriminatory grounds.[60] Courts have held that the catch-all provision prohibits practices such as steering which involves channeling minority housing prospects to designated areas and discouraging them from investigating other areas.[61] While practices that foster racial segregation clearly fall under the general provision, practices that foster integration do not fit neatly within the ban.

Moreover, proponents of integration maintenance can point to their own supportive statutory language. Section 3608(d) provides that "[t]he Secretary of Housing and Urban Development shall. . . administer the

55. *Id.* at 1103.
56. *Id.* at 1107.
57. *Id.*
58. *Id.* at 1108.
59. 42 U.S.C. § 3604(a) (1988).
60. *Id.*
61. *See* United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd without opinions*, 547 F. 2d 1168 (6th Cir. 1977); United States v. Youritan Construction Co., 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd as modified*, 509 F. 2d 623 (9th Cir. 1975).

programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[62] Proponents interpret this clause as mandating the promotion of integration.[63] At best, the statutory language provides ambivalent guidance and does not definitively proscribe Starrett City's integration maintenance plan.

Similar to the statutory language, the legislative history of Title VIII does not settle the question of the validity of integration maintenance programs. No one seems to deny the anti-discriminatory intent behind the Act. However, integration maintenance proponents can also muster ample evidence that Congress also intended to promote integration through the Act. Courts frequently cite the integration goal of the Act.[64] Choosing among these principles may become easier in light of contextual factors beyond the confines of statutory language and legislative intent.

Not able to find a foundation in either the statutory language or legislative intent, both the District Court and the Second Circuit turned to a guiding principle upon which to base its decisions. However, the choice of this principle should be viewed within the contextual reality. Moreover, when an agent purports to take an action in order to help eradicate a recognized evil such as racism, the courts should have further incentive to more closely examine the context of the case. For only then can the courts fully assess the agent's allegedly benevolent actions. This Article in Part II turns to a detailed description of contextual factors (historical, economic, political, and sociological) surrounding the case.

II. BACKGROUND AS FOREGROUND

A contextual analysis, which uncovers the historical, sociological, economic, political forces at work in the case, provides a tool for choosing between the competing principles. As more social factors become apparent, the integration principle gains plausibility over its color-blindness and anti-discrimination rivals. In its traditional form, legal analysis takes a case through a series of distillations. As soon as a controversy

62. 42 U.S.C. § 3608(e) (1988).

63. Otero v. New York Housing Authority, 484 F.2d 1122, 1134 (2d Cir 1973).

64. *See* Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F. 2d 1283, 1289-1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Otero v. New York City Housing Authority, 484 F. 2d 1122, 1133-1135 (2d Cir. 1973); Shannon v. United States Dep't of Hous. and Urban Dev., 436 F. 2d 809, 820-821 (3d Cir. 1970); Williamsburg Fair Housing v. New York City Housing Authority, 450 F. Supp. 602, 606 (S.D.N.Y. 1978). *See also* Linmark Associates v. Township of Willingboro, 431 U.S. 85, 94 (1977) (construing the goal of a local ordinance as promoting stable integrated housing).

enters the legal arena, the distillation process begins because only a certain subset of factors have any legal relevance. Otherwise, the legal system would find itself even more burdened with factual determination than it does presently. Some factors prove irrelevant to the issue at hand; other factors seem too difficult to assess. As the case proceeds from the trial stage to the various appellate levels, the context within which the case had been embedded quickly erodes. Although the distillation process has its own rationale, in the case of *Starrett City* dimming the lights on the background has a distorting effect. The following should help to illuminate the background, leading to a greater appreciation of Starrett City's policy. By ignoring or glossing over these factors, the courts' doctrinal analyses and rulings oversimplify and hinder a just result.

A. *Housing Background*

1. *Housing Policy. Starrett City* must be evaluated in the context of a federal housing policy which condoned racism. Acknowledging the government sanctioned connection takes some of the sting out of Starrett City's policy because its policy did not arise out of a vacuum; it arose in response to this context.

Housing discrimination has a long and persistent history. Discriminatory zoning practices restricted minorities to less affluent neighborhoods until the Supreme Court declared this practice unconstitutional in 1917.[65] Whites then resorted to racially restrictive covenants under which owners and developers agreed not to sell or rent housing to minorities. Likewise the Supreme Court found state court enforcement of these restrictive covenants unconstitutional in 1948.[66]

However, housing discrimination continued under the auspices of the Federal Housing Administration ("FHA"),[67] which required racial restrictions in its home ownership insurance programs.[68] Thus, the fed-

65. *See* Buchanan v. Warley, 245 U.S. 60 (1917) (zoning ordinance that forbids minorities to occupy houses in blocks predominated by whites violates the fourteenth amendment).

66. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

67. The Federal Housing Administration, established by the Housing Act of 1934, was created to insure residential mortgagees on private dwellings against the individual buyer's failure to repay. *See* HOUSING AND HOME FINANCE AGENCY, FEDERAL HOUSING ADMINISTRATION, UNDERWRITING MANUAL: UNDERWRITING ANALYSIS UNDER TITLE II, SECTION 203 OF THE NATIONAL HOUSING ACT § 1, ¶¶ 101-102 (1936).

68. The FHA guidelines for mortgage appraisal called for protection of neighborhoods from the "infiltration of . . . inharmonious racial groups." *Id.* at § 2, ¶ 9229. The FHA finally removed this explicitly racist language in the 1950s. *See* HOUSING AND HOME FINANCE, FEDERAL HOUSING ADMINISTRATION, UNDERWRITING ANALYSIS UNDER TITLE II, SECTION 203 OF THE NATIONAL HOUSING ACT § 13, ¶ 1320 (1955). *See generally* K. TAEUBER & A. TAEUBER, NEGROES IN CIT-

eral government played a crucial role in creating a dual housing market. The discriminatory policies of the FHA had an enormous impact in assisting white flight from the inner cities to the suburbs because the FHA financed three out of every five homes purchased.[69] By creating segregated housing patterns, the government was pivotal in establishing the historical grounding for white flight. Low income, publicly funded housing programs began in the late 1930s.[70] These programs also played an integral role in confining blacks to inner cities. For example, as of 1962, almost eighty percent of all federally subsidized public housing projects were occupied by only one race.[71] Today, government subsidized housing projects face considerable opposition. Many hold fast to the belief that government subsidized housing leads to segregated slums.[72] Robert Rosenberg, manager of Starrett City, claims that this perception helped to defeat several New York State housing bond propositions.[73] Because of these factors, Starrett City's establishment of a stable integrated housing unit faces an uphill battle.

2. *Fair Housing Act.* The Fair Housing Act of 1968[74] plays an vital role in *Starrett City.* President Johnson proposed the law in 1966, but after passage in the Senate, the Act became bogged down in the House Rules Committee and failed to pass.[75] Dr. Martin Luther King, Jr. was assassinated on April 4, 1968.[76] By April 11th, hardly a week later, the law passed Congress, (with no committee report and only a floor debate), and President Johnson signed it into law.[77] Dr. King's assassination resulted in urban unrest and rioting.[78] The Fair Housing Act evolved from a political compromise which attached to the substantive

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IES: RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE (1965); Lief & Goering, *The Implementation of the Federal Mandate for Fair Housing*, 32 URB. AFF. ANN. REVS. 227 (1987).

69. *See* Lief & Goering, *supra* note 68, at 229.

70. United States Housing Act of 1937, Pub. L. No. 412, *amended* by the Housing Act of 1949, Pub. L. No. 171, 63 Stat. 413.

71. *See* Lief & Goering, *supra* note 68, at 231. *See generally* G. GRIER & E. GRIER, EQUALITY AND BEYOND: HOUSING SEGREGATION AND THE GOALS OF THE GREAT SOCIETY (1966) (the authors examine the problem and consequences of segregation in residential areas).

72. Notice that the belief that federally subsidized housing leads to segregated slums is, in part, an empirical claim that may or may not have racist implications.

73. Rosenberg, *Starrett City's Sound Racial Policy*, N.Y. Times, Feb. 20, 1988, at A27, col. 1.

74. 42 U.S.C. §§ 3601-3619.

75. *See* Comment, *Justifying A Discriminatory Effect*, *supra* note 46 at 426-27 n.136 .

76. L. DAVIS, I HAVE A DREAM . . . THE LIFE AND TIMES OF MARTIN LUTHER KING, JR. 247 (1969).

77. Comment, *Justifying A Discriminatory Effect*, *supra* note 46, at 426-27 n.136.

78. *Id.*

provisions legislation enabling the federal government to prosecute those involved in riots and civil disorders.[79] While political compromise is little cause for surprise, the ambivalent beginnings of the Act exemplifies the futility of determining a clear-cut legislative intent or guiding principle. Thus, when deciding which principle upon which to determine the case, courts should look beyond the legislation.

a. **Discriminatory Intent.** Congress enacted the Act under its powers to abolish slavery and involuntary servitude, granted to Congress by the thirteenth amendment.[80] Unlike a constitutional equal protection claim, plaintiffs under the Act need only show a discriminatory effect and not a discriminatory intent.[81] Once plaintiff shows discriminatory effect, the burden shifts to the defendant to prove a legitimate state interest cannot feasibly be met in a less discriminatory manner.[82] The Supreme Court refused to address the government's attempt to require a showing of discriminatory intent in *National Association for the Advancement of Colored People v. Town of Huntington*,[83] by prohibiting Huntington, Long Island from using local zoning to concentrate low-income housing in a minority neighborhood. For the time being at least, a showing of discriminatory effect appears sufficient to establish a cause of action.

Certainly, Starrett City intentionally discriminated in the sense that it explicitly excluded some individuals because of their race. However, no one accused Starrett City's developers of *malicious* discriminatory intent. In fact, the developers appear adamant about maintaining decent integrated housing. Robert Rosenberg, the general manager of Starrett City since its construction began, served as first deputy housing commissioner of New York City under Mayor John Lindsay.[84] In that capacity he "had broken all records for producing subsidized and city-assisted

79. *See* D. BELL, RACE, RACISM, AND AMERICAN LAW 513 (2d ed. 1980). Immediately following passage of the Act, President Johnson requested $11.1 million to administer the Act. *Id.* at 513, n.9 (citing N.Y. Times, May 25, 1968, at 17, c.1). Congress refused to appropriate the funds. *Id.*

80. The thirteenth amendment provides that: "Section 1. Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII. The enactment of the Fair Housing Act was therefore a valid exercise of Congress' power to eradicate slavery and involuntary servitude. *See* Jones v. Mayer Co., 392 U.S. 409, 437-49 (1968).

81. *See, e.g.*, Town of Huntington v. NAACP, 844 F.2d 926, 934 (2d Cir.), *aff'd*, 488 U.S. 1023 (1989).

82. *See id.* at 936.

83. 844 F.2d 926 (2d Cir. 1988), *reh'g denied*, 488 U.S. 1023 (1989).

84. Hellman, *A Dilemma Grows in Brooklyn: Starrett City Fights to Keep Its Racial Mix*, NEW YORK, Oct. 17, 1988, at 55.

housing—more than 25,000 units, by his count."[85] Opponents of integration maintenance cannot point to Starrett City's developers as the paradigmatic "bad guys."

b. Enforcement.[86] The Fair Housing Act provides for three methods of enforcement: (1) suits by the Attorney General of the United States under section 813 of the Act;[87] (2) administrative complaints to the Department of Housing and Urban Development provided for under section 810;[88] and (3) direct court action brought by private complainants pursuant to section 810.[89] Currently, the Justice Department files very few complaints under section 813.[90] The Department of Housing and Urban Development ("HUD") files around 5,000 complaints yearly, but HUD cannot issue cease and desist orders, thereby making it impotent in the face of a recalcitrant defendant.[91] Most major decisions regarding the Act have come about through so-called "private attorney generals."[92] In other words, enforcement of the Act largely depends upon private citizens bringing suit. However, the difficulty in finding victims willing to litigate, proffer statistical evidence, and recover *de minimus* awards[93] creates obstacles not as prevalent in other, more heavily litigated civil rights fields, such as employment discrimination.[94] Thus, the Act does not provide readily available means of enforcement against housing discrimination.

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85. *Id.*

86. Since *Starrett City*, Congress enacted, on September 13, 1988, amendments to the Fair Housing Act designed to put more teeth into the Act. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619. None of these changes affects the analysis offered in the Article.

87. 42 U.S.C. § 3612 (1988).

88. 42 U.S.C. § 3610 (1988).

89. 42 U.S.C. § 3613 (1988).

90. For example, in 1987 the Attorney General filed only 17 suits, the most for any year under the Reagan administration. Schwemm, *The Limits of Litigation Under The Fair Housing Act of 1968*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS at 44 (R. Schwemm, ed. 1988) [hereinafter Schwemm, *The Limits of Litigation*].

91. HUD's lack of enforcement power can be traced to the Dirksen Compromise. Proponents of the Fair Housing Act needed Senator Dirksen's support; Dirksen conditioned his support on HUD relinquishing its power to issue cease and desist order. *Id.* at 44 (1988).

92. The Supreme Court employed the designation of "private attorneys general" in Trafficante v. Metropolitan Life, 409 U.S. 205, 211 (1972).

93. Kushner cites a number of studies showing that awards for damages and attorney fees are very much out of line with the costs of litigation. J. KUSHNER, FAIR HOUSING 659 (1983).

94. According to Schwemm, "[o]ver a twenty year period the reported federal court decisions involving housing discrimination works out to about twenty per year or less than two each month, far below the number of employment discrimination decisions, which run five to ten times that amount." Schwemm, *The Limits of Litigation*, *supra* note 90 at 46-47.

B. Starrett City: *History of the Development*

1. *Politics, Compromises and Finances.* Significantly, Starrett City began as a cooperative.[95] As a cooperative project, it would have remained out-of-reach particularly for low income minorities. As the District Court opinion notes, referring to a 1984 New York Housing Survey, "the problem of decent housing for blacks and other minorities was complicated by the fact that 57,000 rental units were converted to cooperative housing, which limited rental opportunities for blacks and minorities."[96] If Starrett City had been built as originally planned, as a cooperative, it would not have increased the available stock of housing for blacks. This fact becomes important when assessing the charge that Starrett City's policy harmed innocent black housing seekers, the very people the policy was designed to help.

Furthermore, various forces molded Starrett City into not only a rental project, but also into an integrated one. Starrett City would not have gotten beyond the planning stage if its developer had not assured the New York City Board of Estimate that it would create a racially integrated community.[97] Starrett City needed approval of the Board in order to take advantage of the considerable tax abatements originally granted.[98] Political opposition to Starrett City had formed based on the fear of Starrett City's becoming an overwhelming minority development.[99] The Board came "under intense political pressure from Canarsie, the mostly white, conservative community" just west of the site.[100] Even with the assurance from Starrett City's developers that it would create an integrated community, the local Brooklyn Borough President still voted against the project.[101] Starrett City began with considerable political opposition stacked against it. Moreover, under a 15 year agreement with HUD, Starrett City had to rent at least 1,000 units to Very Low Income Families (those whose income does not exceed 80% of the medium income for the area).[102] Given this kind of interaction between

95. *See* Hellman, *supra* note 84, at 55.

96. United States v. Starrett City Assocs., 660 F.Supp. at 674 n.3.

97. *Id.* at 671.

98. *See id.* at 670.

99. *Id.* From 1960 to 1970 East New York went from 2/3 white to 3/4 black. Concomitantly, property values plummeted and the crime rate rose. *Double Reverse Discrimination, supra* note 1, at 14.

100. Hellman, *supra* note 84, at 55. *See generally* Brief for Defendants-Appellants at 8, *Starrett City* (citing Rosenberg Aff.) (discussing the opposition faced by developers of the Starrett City rental housing development).

101. United States v. Starrett City Assocs., 660 F. Supp. at 670.

102. *Id.* at 671.

Starrett City and the government, Starrett City's claim that it functioned as a state actor becomes more plausible.[103]

Starrett City procured finances through governmental and private sources. HUD's payments to the Housing Finance Agency ("HFA") reduced from 8.5% to 1% the interest rate that Starrett City otherwise would have had to pay on its mortgage.[104] HFA had received more than $211 million from HUD on Starrett City's behalf by March 1986.[105] Investment bankers saved millions of tax dollars by investing in subsidized rental housing, such as Starrett City, because at the time it was the best tax shelter available.[106] Taxpayers' money heavily subsidized Starrett City in terms of investment capital. Although private investors made contributions of about $19 million, the Housing Finance Agency (HFA) of the State of New York issued a mortgage loan to Starrett of nearly $363 million.[107]

2. *Site Selection.* One closing observation should round out this portion of the contextual picture. The Starrett City developers did all that they could to make the project appealing to non-minority prospective tenants. Construction began on the north side where the site bordered on East New York. This was a logical place from a construction point of view to begin the project because of its access to water pipes and electric lines.[108] However, the planners, in order to prevent prospective tenants from seeing the adjoining urban blight of East New York, suspended construction at an additional cost of over $1 million, and changed the location of the building site.[109]

Even though hiding the surrounding blight from prospective tenants is not the most forthright practice, this action does not undermine the overall importance of the project's location—in the midst of a ghetto.

103. The District Court found that Starrett City was a private landlord "not clothed in governmental authority." *Starrett City*, 660 F. Supp. at 678. Yet, the history of the project shows the developer's actions inextricably intermingled with the government at practically every stage. Throughout its history, Starrett City acted in consultation with and often at the behest of governmental agencies in developing and implementing its integration maintenance plan. HUD approved of Starrett City's integration maintenance plan and rejected attempts to include prohibitions on integration maintenance in its regulations. Recent Developments, *supra* note 11 at 565 n.22 (citing 54 Fed. Reg. 3235 (daily ed., Jan. 23, 1989)). That fact should provide sufficient governmental clothing to bring Starrett City more under the umbrella of *Otero* than the courts seem willing to admit.

104. *Starrett City*, 660 F.Supp. at 671.

105. United States v. Starrett City Assocs., 840 F.2d at 1104 (Newman,J. dissenting).

106. Hellman, *supra* note 84, at 55.

107. *Starrett City*, 660 F. Supp. at 670.

108. *See* Hellman, *supra* note 84, at 56.

109. *Id.*

The controversy over Starrett City's integration maintenance plan pales in comparison to the problems generated by selecting sites for entire projects, because the latter has a much more dramatic impact on racism. This is true particularly if the site, unlike Starrett City, is located outside areas of minority concentration. Large numbers of minorities move as a result of site selection decisions. If the housing project is located in a largely white area, large numbers of minorities may move there, and greatly affect overall housing patterns. An integration maintenance scheme, on the other hand, tends to affect the racial housing patterns of relatively fewer minorities.

Although public housing cannot legally be limited to or prohibited from minority areas,[110] the realistic prospects for locating minority public housing projects in the suburbs are small. This observation illustrates the importance of considering Starrett City's location. The doctrinal analysis manages to place the site location variable in the background. Yet, whether Starrett City was built in a minority area, on the periphery of a ghetto, or in a largely white area is significant. The developer built Starrett City between a minority area (East New York) and a blue collar area (Canarsie).[111] Starrett City's location cannot be conveniently relegated to irrelevant background information; it molded its development at every turn.

The neighborhood of Canarsie borders Starrett City.[112] An appreciation of the complex dynamics underlying this largely blue-collar, middle income, Italian and Jewish neighborhood enhances an understanding of Starrett City. The people of Canarsie feel threatened by what they perceive as the encroaching ghettoes of Bedford Stuyvesant, Brownsville, and East New York to its north. Whites, mostly immigrants, fled from those areas into places like Canarsie.[113] To the white occupants of the

110. Housing developments cannot be limited to minority areas. *See* Gautreaux v. Chicago Hous. Auth., 296 F.Supp. 907 (N.D. Ill. 1969). Nor can housing projects be prohibited from minority areas. *See* Congressional amendment to Housing Act in 1980 providing that HUD could build public housing in minority areas. Housing and Community Development Act of 1980, PUB. L. No. 96-399, § 216, 94 Stat. 1614 (1980) (codified at 42 U.S.C. § 1436b (1988)).

111. *Double Reverse Discrimination*, *supra* note 1, at 14.

112. *Id.*

113. Many residents of Canarsie had been New Deal liberals, but their flight did much to change that:

> When the people of Canarsie ran from East New York and Brownsville, they ran from their New Deal concepts of integration. They accepted the concept of civil rights, liberty for all, and freedom of expression until it impinged on them and their basic right to maintain the kind of society which doesn't threaten them. The basic fear of the minority community is participating with them where they live.

area, Canarsie represented the last stand. In some sense, they saw Starrett City as a buffer between themselves and the growing ghettoes that threaten to engulf Canarsie.[114] Canarsie played a key role in forging the deal between the Board of Estimates and the developers, a deal that conditioned the Starrett City project on an integration maintenance policy.[115]

Starrett City sits just one exit down the Belt Parkway from Howard Beach,[116] the scene of some recent horrifying racial tensions.[117] Starrett City's experiment in integrated housing stood in stark contrast to other projects in New York City. Many such projects tipped and became segregated—Rochdale Village, Lefrak City, Fairfield Towers (right across the street from Starrett City) and Pink Houses. Others, such as the Mitchell-Lama projects, started out and remain almost totally white.[118]

C. Starrett City: *History of Case*

The history of the *Starrett City* case traces back to 1979 when a group of black applicants brought suit in the United States District Court for the Eastern District of New York.[119] Four years later, in 1983, the court certified a plaintiff class.[120] The individual representatives of the class in this case waited a considerable amount of time, up to four years, before even a prospect of redress began to form. In March 1985, the parties stipulated to a settlement and entered into a consent decree[121] which required Starrett City to make available an additional 35 units per year for five years to black and minority tenants, thereby increasing the

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J. RIEDER, CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM 56-57 (1985) (quoting a resident of Canarsie).

114. Ironically, the word "Canarsie" comes from the Algonquian word meaning fort, fenced land, or palisade. *See id.* at 13.

115. *See* Brief for Defendants-Appellants at 7-8, *Starrett City* (citing Rosenberg Aff. and Goldwin Aff.).

116. Memorandum of Law of Concerned Public Officials and Civil Rights Housing and Community Organizations as *Amicus Curiae* in support of Starrett City's Petition for Rehearing at 5.

117. *See* Hornblower, *N.Y. Marchers Protest Racial Attack, Hundreds Gather in Neighborhood Where Black Child Died in Chase*, N.Y. Times, Dec. 28, 1986, at A1, col. 1.

118. Brief for Defendants-Appellants at 12, *Starrett City*.

119. Saundra and Joseph Perceival, both professional nurses, and 4 others initiated the original suit. Hellman, *supra* note 84, at 55.

120. Arthur v. Starrett City Assocs., 98 F.R.D. 500 (E.D.N.Y. 1983).

121. Arthur v. Starrett City Assocs., 605 F. Supp. 262 (E.D.N.Y. 1985). *See* Stipulation and Consent Decree in *Arthur v. Starrett City Associates*, in the United States District Court for the Eastern District of New York (No. 79-cv-3096) (1985), in Petition for Writ of Certiorari I-20 [hereinafter Consent Decree].

minority ceiling for the project.[122] In addition, the New York State Division of Housing and Community Renewal ("DHCR") agreed to give priority to minority applicants on Starrett City's waiting list in other, predominantly white, projects.[123] The significance of the consent decree is that it represents an attempt to alleviate the plight of those allegedly harmed by Starrett City's policy. Furthermore, no member of the class, including 8,000 minority applicants on the waiting list,[124] objected to the settlement.[125]

A class action suit and a subsequent consent decree seem to represent the preferred way of attacking the integration maintenance policy because *inter alia*, the people directly affected by the policy influence the dispute resolution. Although Starrett City's integration maintenance policy harmed the individuals who initiated the law suit, the harm extended beyond those individuals to the entire group of minority applicants. A class action suit addresses the interests of potential victims of the alleged discrimination.[126]

The plaintiffs in the *Arthur* case sought primarily injunctive relief and only secondarily money damages.[127] The suit classified as a Rule 23(b)(2)[128] class action for injunctive relief in contrast to a Rule 23(b)(3) class action that allows for money damages.[129] The former, unlike the latter, does not require that all members of the class receive notice nor does it afford class members who seek punitive damages an opportunity to opt out of the class.[130] However, under Rule 23(e), the settlement of the class action must get approval from the court in order to assure that the settlement protects the interests of absent class members.[131] In order

122. United States v. Starrett City Assocs., 840 F.2d at 1098.

123. *See id.* at 1105 (Newman, J., dissenting). The consent decree thereby opened up a considerable amount of housing for minority applicants since many of the 86 projects specified in the decree were totally white or nearly so. Hellman, *supra* note 84, at 56.

124. *See* Hellman, *supra* note 84, at 56.

125. *Starrett City*, 840 F.2d at 1105 (Newman, J., dissenting).

126. In order to be certified as a class, the plaintiffs must meet the prerequisites to a class action: numerosity, commonality, typicality, and representation. FED. R. CIV. P. 23(a). Before certifying a class, the court must be persuaded that the plaintiffs bringing the suit will fairly and adequately represent the interests of the class. *Id.*

127. Arthur v. Starrett City Assocs., 98 F.R.D. 500 (E.D.N.Y. 1983).

128. FED. R. CIV. P. 23(b)(2). The rule states that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief . . . with respect to the class as a whole." *Id.*

129. *Id.* at 23(b)(3). A rule 23(b)(3) class action involves individuals who could sue alone but a class action is preferable. *Id.*

130. *Id.* at 23(c)(2)-(3).

131. *Id.* at 23(e).

to effect this, all class members must have adequate notice of the settlement.[132] Therefore, although the individuals on the waiting list had the power to object to the consent decree, they did not. In other words, enough procedural safeguards were in place to reasonably assure the protection of all those affected.

Given the relative satisfaction of everyone involved in the settlement, the Justice Department's continued intervention after the *Arthur* parties settled becomes more difficult to understand.[133] However, two concerns dampen support for the claim that all appeared satisfied and help explain the Justice Department's intervention. First, the court may have simply "rubber stamped" the consent decree without adequately protecting the interests of all class members.[134] Although the plaintiffs probably could not have successfully insisted on the dismantling of Starrett City's integration maintenance program, the class presumably could have struck a better deal, such as, an incremental raising of the minority ceiling. Nevertheless, the arrangement made by the class representatives appears fair because it achieved a redistribution of the housing stock available to minorities.[135]

The second concern is that in reaching the settlement, the class representatives may have served their own interests, rather than the interests of those class members they purportedly represented. The settlement took place very soon after the Open Housing Center, a grass roots organization that supplied legal counsel for plaintiffs, lost a substantial community action grant, and the group did not desire a long trial.[136] However, neither the issue of rubber stamping nor the class representative's financial difficulties seems to have entered the Justice Department's calculation of whether to continue the suit. The Department's failure to address these issues makes suspicious its claim that it initiated the suit to better protect minority interests.

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132. *Id.*

133. The government began its suit against Starrett City in June 1984. Brief for Defendants-Appellants at 2, *Starrett City*. The *Arthur* settlement was reached in March of 1985. *See* Consent Decree, *supra* note 121, at I-20.

134. *See* Resnick, *Judging Consent*, 43 U. CHI. L. F. 43, 88 (1987). However, as Resnick points out, a judge should make an independent determination of the adequacy of the settlement and not act as a rubber stamp. *Id.*

135. The Division of Housing and Community Renewal adopted a program to make more apartments available to minorities. *See* Consent Decree, *supra* note 121, at I-9.

136. *See* Hellman, *supra* note 84, at 56.

D. *Reagan Administration Politics*

Unlike school desegregation and employment discrimination cases, *Starrett City* cuts across traditional ideological lines. Some of those opposed to the use of quotas came to the defense of their use in this case. Others, generally in favor of quotas, found themselves in opposition to their use in this instance. The opposing counsels in *Starrett City* symbolize the paradoxical nature of this case.[137]

Starrett City hired Morris B. Abram as its attorney.[138] As a civil rights attorney and as a member of the Reagan administration's Civil Rights Commission, Abram publicly proclaimed his acceptance of color-blind ideals. Abram opposed affirmative action plans as illegitimate uses of quotas.[139] Yet Abram found himself in the role of defending Starrett City's quotas.[140] Although lawyers quite often defend clients in cases that run counter to their personal beliefs, Abram's predicament symbolizes the kinds of contradictory strains running throughout this case.

The policy of integration is normally associated with organizations like the National Association of Colored People ("NAACP"). However, the NAACP represented individuals opposed to Starrett City's integration maintenance policy; it took the side of the five blacks who sued on grounds of discrimination.[141] Yet to date the NAACP has not adopted a policy on integration maintenance.[142] Attacking a particular quota system and failing to devise a national policy on that issue raises no inherent contradictions. Again, the NAACP's waffling on this issue symbolizes the conflicting pulls that underlie our collective reactions to racial issues.[143]

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137. *See generally Double Reverse Discrimination*, *supra* note 1, at 14 (the author analyzes the complex relationship between the opposing counsels and their ideologies).

138. *See id.*

139. *See* Abram, *What Constitutes Civil Rights?*, N.Y. Times, June 10, 1984, § 6 (Magazine), at 52; *Liberalism and the Jews, A Symposium*, COMMENTARY, Jan. 1980, at 15; Morris, *Democrats Take a Stand on Race Preferences*, Wall St. J., June 15, 1984, at 30, col. 2.

140. *Double Reverse Discrimination*, *supra* note 1 , at 15.

141. *Id.* at 16.

142. Hankins, *Starrett City and Other Race-Conscious Methods of Achieving Integration*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS, at 110 (R. Schwemm ed. 1988).

143. For example, Rieder recounts a meeting of citizens following a racial fight at Canarsie High School, located near Starrett City, in the fall of 1966. The debate turned to the composition of the largely black security force, wherein black adults began to argue for a color-blind norm of merit while the whites lauded the merits of quotas for white security guards. *See* J. RIEDER, *supra* note 113, at 190 (1985). The busing of Russian Jewish children into the Canarsie public schools to compensate for the declining white enrollments provides another ironic twist. *Id.* at 194-95. Blacks promoting color-blindness and whites advocating quotas and busing illustrates the unexpected positions groups take when confronted with racial issues.

William Bradford Reynolds, Assistant United States Attorney filled the role as the Reagan "administration's point man in its effort to dismantle affirmative action quotas."[144] Most affirmative action programs attempt to help minorities. The Reagan administration's attack on affirmative action programs did not endear it to many members of the civil rights community. *Starrett City* provided Reynolds with an opportunity to "show [that] his hatred of quotas" was "pure."[145]

According to Reynolds, in the 1950s the civil rights movement advocated a color-blind philosophy that did not include affirmative action.[146] Reynolds saw the civil rights movement going astray when in the 1970s, "the quest for equality of opportunity for individuals began in some quarters gradually to evolve into an insistence upon equality of results for groups."[147] In Reynold's view, quotas fly in the face of "the uniquely American belief in the primacy of the individual."[148]

In June 1984, the government commenced the action against Starrett City.[149] Justice Newman's dissent indicates his suspicion of the government's motives in filing the suit: "[j]ust one month after the settlement was reached, the United States filed this suit, ostensibly concerned with vindication of the rights of the same minority applicants for housing who had just settled their dispute on favorable terms."[150] However, Reynolds claims that the Justice Department "only zoomed in when we saw that the NAACP took a dive,"[151] implying that the Reagan administration came to the rescue of the NAACP in this suit.

In 1988 *Starrett City* was one of two Title VIII civil cases won by the Justice Department at the trial level. The other involved a claim of discriminatory municipal services against American Indians in Northern Michigan.[152] The Reagan administration's enforcement of the Fair Housing Act was at best, a feeble attempt. From 1968 to 1978, the Justice Department filed three hundred housing discrimination suits; during the Carter administration, sixty-six cases; during the first term of the

144. Hellman, *supra* note 84, at 55.

145. *Id.*

146. Reynolds notes that the school children's attorney in Brown v. Board of Education, Thurgood Marshall, urged the Court to adopt a color-blind philosophy. Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 998 (1984).

147. *Id.* at 1001.

148. *Id.* at 1003.

149. United States v. Starrett City Assocs., 840 F.2d at 1105 (Newman, J., dissenting).

150. *Id.*

151. *See* Hellman, *supra* note 84, at 56.

152. Schwemm, *Fair Housing Act: When Good Intentions Aren't Enough*, LEGAL TIMES at 20, col. 1 (May 16, 1988).

Reagan administration, seven.[153] In contrast to the Reagan Justice Department's reluctance to file Fair Housing Act suits, the consent decree in *Arthur* represents one of many it attacked. The Department assailed other consent decrees "that settled previous anti-discrimination cases in 51 cities, counties, school districts and state agencies."[154]

Attacking consent decrees in this manner seems contrary to the Reagan Administration's general philosophy in favor of voluntary agreement without government interference.[155] Given the sparseness of governmental enforcement of the Act, the Government's concerted efforts against Starrett City begin to take on an air of suspicion. The government expended considerable resources suing Starrett City, although the parties adopted a consent decree.[156] A deeper economic philosophy opposed to government support for the redistribution of public goods to minorities may have motivated the Administration in its housing policy.

The facts described in this Part would not play an important role in the doctrinal analysis. Yet, eliminating the contextual details from an examination of the case distorts our understanding of *Starrett City*. It did not evolve in isolation. In light of the historical context, Starrett City's policy of integration maintenance gains plausibility because it enhances one's understanding of the goals of its developers — what they intended to accomplish. On the other hand, reliance on the bare-bone facts recited at the outset of the Article results in almost immediate condemnation of Starrett City's use of racial quotas. Thus, the rich array of facts described here in Part II lend considerable support to Starrett City's policy. Part III illustrates how the contextual details provide a means for choosing between the three principles at stake in this case: anti-discrimination, color-blindness, and pro-integration.

III. CRITIQUE OF THE COURTS' ANALYSES

Part I described the doctrinal analysis of *Starrett City*. Part II unravelled the detailed intricacies of the story surrounding Starrett City. Now Part III explores the ways in which the contextual understanding supports Starrett City's policy.

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153. *See* Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7, at 243-44 & nn. 204-205 (citing Wolvovitz & Lobel, *The Enforcement of the Civil Rights Statutes: The Reagan Administration's Record*, 9 BLACK L.J. 252, 257-258 (1986)).

154. Davidson & Watkins, *Civil Rights Under Reagan*, Wall St. J., Oct. 30, 1985, at 4, col. 3.

155. *See* K. PHILLIPS, THE POLITICS OF RICH AND POOR 93 (1990).

156. See *supra* notes 119-125 and accompanying text for a discussion of the Consent Decree and the *Arthur v. Starrett City Assocs.* case.

For the purposes of the analysis, certain parts of this section conflate the similar but distinct decisions by the District Court and the Second Circuit. Basically, both courts saw Starrett City as addressing the wrong harm (tipping) with the incorrect remedy (racial quotas) in violation of a sacrosanct principle (anti-discrimination). The developers of Starrett City, on the other hand, saw tipping as an early warning sign of urban decay and employed integration maintenance as a stop-gap remedy to promote integration. The following is an attempt to shed light on the three areas of dispute — harm, remedy, and principle— through a contextual analysis.

A. *The Harm: Tipping*

The District Court called into the question Starrett City's reliance on the tipping phenomenon.[157] According to the tipping principle, "white families will abandon and avoid a given housing development or neighborhood after the black percentage of the population exceeds a certain point. . . ."[158] The court became particularly disturbed at one of Starrett's own experts, Oscar Newman, acknowledging that tipping could occur over a wide range, "from a low of 1% black to a high of 60% black."[159]

The District Court's attack on the empirical foundations of tipping prove woefully misplaced. Even granting the unreliability of most predictions from the social sciences, the court missed the point of the tipping phenomenon. The issue is not whether social scientists can accurately predict precisely the point at which tipping will occur; the court confuses two levels of inquiry. The first level sets forth the range within which tipping occurs. Newman's claim that tipping happens anywhere between 1 to 60% black occupancy rate[160] relates to that first range. His claim seems at least plausible, since some housing developments could tip when only one black family is present.[161] The second level of inquiry revolves around the issue of a legitimate tipping range for a particular project such as Starrett City. The tipping point for Starrett City can be partially determined from experience with the project. In the case of Starrett City,

157. United States v. Starrett City Assocs., 660 F.Supp. at 678.

158. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 251 (1974).

159. *Starrett City*, 660 F.Supp. at 678.

160. *Id.* at 674.

161. Newman, *Fair Housing: the Conflict Between Integration and Nondiscrimination*, in ISSUES IN HOUSING DISCRIMINATION 177 (1985) (quoting C. RAPKIN & W. GRIGSBY, THE DEMAND FOR HOUSING IN RACIALLY MIXED NEIGHBORHOODS (1960)).

the racial composition has held steady at 40% minority. Because a rapid decline in the white occupancy has not occurred, the tipping point has not fallen below 40%.[162]

However, granting *arguendo* that social scientists cannot determine the exact tipping point nor the tipping range, does that lead us from the realm of sociological fact to sociological values where tipping becomes nothing more than a euphemism for a racism index?[163] Do whites flee from integrating areas because of their discriminatory attitude against blacks? Does tipping in fact give a social science gloss to racism?

In order to approach these questions, take the following proposition:

> All whites flee because of their fear of blacks.

The inference that:

> All whites flee because of their discriminatory attitude towards blacks,

follows, only if,

> 'fear of blacks' is equivalent to 'discriminatory attitude towards blacks.'

However, not all fear adds up to discrimination. Therefore discrimination must involve a particular kind of fear, *i.e.*, a fear based on racial prejudice, and it must exclude fears based on any other factors. A defense of tipping would then have to find non-prejudicial fears that would induce whites to flee.

Garry Wills has aptly uncovered the more legitimate factors underlying white flight in the following quotation.[164] The term "tipping" could easily replace the "desire for 'law and order' ":

> The desire for 'law and order' is nothing so simple as a code word for racism; it is a cry as things begin to break up, for stability, for stopping history in mid-dissolution. Hammer the structure back together; anchor it down; bring nails and bolts and clamps to keep it from collapsing. There is a slide of things—queasy seasickness. . . .[165]

Equally complex motivations underlie the adherence to a law-and-order philosophy and the phenomenon of white flight. Many factors lead to white flight.[166] Variables other than prejudicial fear, such as, "popula-

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162. Telephone interview with William Ruddick, Public Affairs Associate for Grenadier Realty Corporation and Starrett City (Aug. 20, 1990) [hereinafter Telephone interview].

163. *See* Current Issues, *supra* note 44, at 30.

164. *See* G. WILLS, NIXON AGONISTES: THE CRISIS OF THE SELF-MADE MAN (1970).

165. *Id.* at 51-52.

166. *See* Current Issues, *supra* note 44, at 29-30. According to one writer, "it is not obvious that this [white flight] is a manifestation of the racial attitudes of the inhabitants involved." *Id.*

tion growth, employment opportunities, housing stock, real estate activity, and the presence of community groups" help account for the existence or lack of white flight and urban blight.[167]

The fear of urban blight is a variable in tipping analysis. In examining the racial implications of that fear, one must ask, does tipping theory simply legitimate a discriminatory conflation of "minority" with "undesirable"?[168] Or does the concentration of racial minorities necessarily result in urban blight?[169] At least one court has acknowledged the connection between racial concentration with urban blight: "[i]ncrease or maintenance of racial concentration [of minorities] is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy."[170]

One need not harbor racist attitudes in order to draw this connection.[171] Analogously, many whites want good schools for their children. If they flee from a neighborhood with inferior schools to one with better schools, that does not necessarily imply racist attitudes on their part even if their move takes them from a predominantly black neighborhood to a white one.

One should be wary of imputing racist attitudes on all housing decisions. Presumably racial minorities could (and undoubtedly do) harbor prejudicial attitudes against the white majority. If a black family refuses to be the pioneer to move into an all white neighborhood, we do not invoke racism, even if the family members might be or are prejudiced. In that case, instead of emphasizing the racial attitudes of the family in question, the contextual analysis rightfully shifts to the difficulties the family would face in that situation. The tipping analysis, alternatively, can be seen as making a similar adjustment in focus, away from the attitudes, racial and otherwise, and towards the contextual conditions.

If the District Court had looked closer at Starrett City, it would have found an experiment designed to retard the decay of urban housing

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167. *Id.*

168. One author suggests that "tipping point theory approves this 'minority' to 'undesirable' analogy." *Id.* at 32.

169. The complex interplay of factors underlying tipping can best be illustrated by noting how difficult it is to separate out issues of race from issues of poverty.

170. Shannon v. United States Dep't of Hous. and Urban Dev., 436 F.2d 809, 821 (3rd Cir. 1970). *See* Farrell, *Integrating by Discriminating: Affirmative Action that Disadvantages Minorities*, 62 DET. C. L. REV. 553, 565 (1985). Farrell notes the "inherently racist overtones of this language." *Id.*

171. Starrett City's attorney, Morris Abram predicted that a decision against Starrett would " 'create a segregated wasteland.' " *Starrett City Will Stop Using Quotas to Foster Integration*, N.Y. Times, Nov. 8, 1988, at B4, col. 1.

by promoting an integrated community. Tipping accounted for a small portion of Starrett City's concerns. Along with preventative measures designed to halt tipping, Starrett City also tried to build something positive, a community.

B. *The Remedy: Integration Maintenance*

The Second Circuit used a three pronged test[172] in *Starrett City*. According to that test, a race-conscious plan must be temporary;[173] it must remedy prior discrimination;[174] and it should not deny access of minorities to housing.[175] Each prong of the test confronts difficulties when applied to the context of Starrett City.

1. *Temporary Remedies.* The Second Circuit's first criterion raises a number of questions, such as, just how temporary is temporary? Can a quota or a target be temporarily invoked at various times over a long period of time depending on the changing conditions? The Supreme Court approved a plan authorizing temporary "targets" to remedy gender discrimination in *Johnson v. Transportation Agency*.[176] The court approved the plan even though the Agency's target would not be achieved in a brief period of time because of the small turnover in road construction jobs.[177] Professor James Kushner suggests that Starrett City could draft a similar temporary triggering program "where, if the racial mix reaches a certain percentage—it might be 60 percent or 70 percent minority—at that point a temporary program would be instituted. . . [i]t would again dissolve as soon as the mix came back to 50/50 or whatever the mix might be."[178]

Although Starrett City could devise a plan with more temporary characteristics, it still might construe the implementation of its current integration maintenance plan as a temporary devise. At the time of the

172. The three pronged test allows the court to avoid constant judicial supervision. *See* Note, *United States v. Starrett City Associates, 840 F.2d 1096 (2d Cir. 1988)*, 36 WASH. J. URB. & CONTEMP. L. 279, 287. The "three-pronged test correctly eliminates the need for continuous judicial supervision." *Id.*

173. United States v. Starrett City Assocs., 840 F.2d at 1101.

174. *Id.* at 1102.

175. *Id.*

176. Johnson v. Transportation Agency, 480 U.S. 616 (1987). Justice Brennan, writing for the majority, noted that the Agency's Plan did not set aside positions for women but merely authorized affirmative action as a relevant factor in the consideration of candidates. *Id.* at 638.

177. *Id.* at 639.

178. *See* Kushner, *Starrett City and Other Race-Conscious Methods of Achieving Integration*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS at 110-11 (R. Schwemm ed. 1988).

decision, the quotas had been in effect for ten years and the developers predicted another fifteen years for the policy[179] until Starrett City's integration maintenance program would achieve its goal of stable integration.[180] Stable integration is evidenced by a consistently low turnover rate. At the time of the litigation for this case, it was simply too soon to determine whether stability had been achieved.

However, even if the long term focus of Starrett City's project precludes "temporary" status, factors such as its location[181] support the duration of its policy. Starrett City may have to implement long-term measures in order to meet its goal of stable integration. A more prolonged program seems necessary because minorities constitute the vast majority of those awaiting approval for an apartment in Starrett City.

A connection between high minority occupancy and housing deterioration becomes effective at the point where infrastructure support for the housing project gets withdrawn. Starrett City would argue that integration maintenance serves as a guarantor of the infrastructure support. Accordingly, this infrastructure support helps insure better schools and safer neighborhoods.

2. *Prior Discrimination.* The second prong of the Second Circuit's test requires that Starrett City's racial conscious policy remedy its acts of prior discrimination. The court found no evidence of "prior racial discrimination or discriminatory imbalance adversely affecting whites within Starrett City."[182] This analysis does not fully comport with the Supreme Court's subsequent analysis in *Richmond v. Croson*.[183]

In *Croson* the majority struck down the City of Richmond's affirmative action plan. The City Council, in 1983 adopted a plan which "required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the con-

179. *See* United States v. Starrett City Assocs., 840 F.2d at 1102.

180. *Id.*

181. Colleen McMahon, one of Starrett City's attorneys, describes Starrett's situation:

> Starrett City is sited on a garbage dump next to a racially segregated slum. It is across the street and around the corner from two previously built, federally assisted housing projects that tipped almost immediately and are now segregated by both race and class. It is thirteen miles from Manhattan. It has no direct public transportation. It is cut off on all sides from the white neighborhoods that surround it and is adjacent and accessible only to the black neighborhood of east New York that is on one side of it. It is under a direct Kennedy Airport flight path.

See McMahon, *Starrett City and Other Race-Conscious Methods of Achieving Integration*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS at 111-12 (R. Schwemm ed. 1988).

182. *Starrett City*, 840 F.2d at 1102.

183. 488 U.S. 469 (1989).

tract to one or more Minority Business Enterprise (MBE's)."[184] The Court held that the city could not implement its remedial plan because it had failed to demonstrate a compelling interest in apportioning public contracting on the basis of race and also that past societal discrimination alone was not enough to support rigid racial prejudices.[185] However, Justice O'Connor's opinion indicated that the city could have taken affirmative steps if it demonstrated that it had at least a passive role in perpetuating racial discrimination in the construction industry, as a whole.[186]

Under the standard utilized by the Second Circuit and the *Croson* Court, Starrett City would be required to show that it was remedying some act of past discrimination. The Second Circuit's analysis would require Starrett City to show it was remedying past discrimination while O'Connor's analysis would require Starrett City to demonstrate discrimination by other developers in filling housing projects in the area, rather than its own past discrimination. That showing does not seem beyond Starrett City's reach given the segregated status of housing developments in the area.[187]

Starrett City developed at a time and place where integrated housing developments were extremely rare. It represents an attempt to correct a discriminatory trend toward segregated housing throughout the housing field. Ironically, Starrett City would have a much stronger legal position under the Second Circuit's analysis if it had first implemented a clearly discriminatory policy. Thus, Starrett City's race-conscious housing policy would only be justified if it was an attempt to remedy its own past discrimination.

3. *Impact on Minorities.* The final prong in the test exhibits the court's concern for the impact of the quota system on minorities:

> Starrett's quotas do not provide minorities with access to Starrett City, but rather act as a ceiling to their access. Thus, the impact of appellants' practices falls squarely on minorities, for whom Title VIII was intended to open up housing opportunities.[188]

The court's analysis of the impact on minorities lends itself to criticism. First, Starrett City's policy provided minorities with access to housing in

184. *Id.* at 477.

185. *Id.* at 505.

186. *Id.* at 492. O'Connor's opinion was joined by Justices Rehnquist and White. *Id.* at 469.

187. *See* United States v. Starrett City Assocs., 840 F.2d at 1108; United States v. Starrett City Assocs. 660 F. Supp. at 674 (citing Newman's studies).

188. *Starrett City*, 840 F.2d at 1102.

Starrett City: a housing development which would not have been built unless its developers had agreed with the Board of Estimates to the integration maintenance plan.[189] Most likely, the minority tenants would not have had housing of the caliber of Starrett City "but for" Starrett's policy.[190] Secondly, Starrett City's policy, as altered by the consent decree in the previous suit,[191] led to greater access to minority housing. The consent decree opened up minority access to eighty other, almost exclusively white, subsidized housing projects in New York City.[192] *Starrett City* effectively dismantles at least one aspect of the *Arthur* consent decree because part of the consent decree was to increase the ceiling quota. Therefore the court's decision, contrary to its own concerns, may do more harm to minorities than Starrett City's policy because fewer minorities will have access to quality housing.

C. *The Principle: Anti-Discrimination*

Many judicial opinions and legal thinkers subscribe to the anti-discrimination principle.[193] According to Paul Brest's oft-cited formulation, the anti-discrimination principle "disfavors race-dependent decisions and conduct—at least when either selectively disadvantage the members of minority groups."[194] The anti-discrimination principle explicitly addresses the harm caused to minorities in its assessment of a program.

In addition, a notion of equality underlies the anti-discrimination principle;[195] thus, it would be wrong to treat similarly situated individuals differently on the basis of problematic dimensions such as race.

189. *See id.* at 1104 (Newman, J., dissenting).

190. This fact is almost always ignored in commentaries on Starrett City. Most commentators agree, without providing their own analysis, that Starrett City's quotas "did not open up housing opportunities." Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7, at 241-42.

191. *See* Consent Decree, *supra* note 121, at I-7.

192. *Id.*

193. See generally Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) for the classical formulation of the principle in the context of equal protection analysis.

194. Brest, *Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 6 (1976). Brest cites Hills v. Gautreaux, 425 U.S. 284 (1976) which required that government agencies remedy their past discriminatory selection of public housing sites by consciously locating future projects in predominantly white neighborhoods as decided according to the anti-discrimination principle. *Id.* at 3.

195. For example, Farrell proposes that in the housing context, the principle of equality (chosen behind a Rawlsian veil of ignorance) requires similarly situated persons to be treated similarly. *See* Farrell, *supra* note 170, at 576-86. Rawls proposed that we should choose the principles of justice behind a veil of ignorance so that our particular prejudices do not interfere with rational choice. *See* J. RAWLS, A THEORY OF JUSTICE (1971).

However, race-conscious decisions and conduct pose a problem for the anti-discrimination principle. On the one hand, the principle seems to completely rule out race-conscious remedies, because by definition, they do not treat similarly situated people similarly. On the other hand, many proponents of the anti-discrimination principle make allowances for some forms of affirmative action.[196] Proponents skirt around the dilemma by accepting race-conscious remedies only when they benefit minorities. If a race-conscious decision denies benefits to minorities, the decision violates the principle of equality since minorities do not benefit. The acceptance of a race-conscious program hinges on whether or not it benefits minorities. Through the use of occupancy ceilings, Starrett City excluded some minority applicants from the project, denied them a benefit, and thereby violated this interpretation of the anti-discrimination principle.

However, applying such an interpretation of the anti-discrimination principle creates difficulties. For example, does this interpretation of the anti-discrimination principle preclude *any* denial of benefits to *any* minority person? If it does, then it must be rejected because no matter what program gets implemented, it will likely have some adverse affect on some minority person; a program designed only to benefit minorities will have an adverse affect on some minority individuals, simply by precluding them from participation. Alternatively, policies condemned under the anti-discrimination principle, such as segregation, can actually benefit some minority members. For example, benefits accrue to some minority members from their attendance of segregated schools.[197]

If the anti-discrimination principle manifests a concern for innocent victims, then it needs to consistently exercise this concern. Starrett City's policy discriminates against minorities, a fact admitted to by Starrett City.[198] However, does not the dismantling of Starrett City's policy also discriminate? Without integration maintenance, innocent minorities become victimized because less decent housing is available. In the only scholarly article defending Starrett City's policy the author argues that:

> In a situation where tipping is imminent, racial discrimination is inevitable. In form, it will be either affirmative, race-conscious action to prevent segregation (as in *Otero*), or a simple abdication of the duty to prevent segrega-

196. Brest, *supra* note 194, at 16-19.

197. *See* Farrell, *supra* note 170, at 589-93 (citing a number of studies and cases that question the benefits of integration). For example, black students receive a disproportionate amount of disciplinary action in integrated schools. *Id.* at 589.

198. *See* Brief for Defendants-Appellants at 41, *Starrett City*. Starrett City described its policy as "admittedly burden[ing] minorities." *Id.*

tion (*Starrett City* without its quota).[199] (citations omitted).

By rejecting Starrett City's integration maintenance policy, the Second Circuit opened the door so that a "more segregated project" was " 'free' " to form[200] and violated the very anti-discrimination principle it relied on to reject Starrett City's ceiling.[201] Presumably, the court would have allowed Starrett City to raise rents to a point where a greater percentage of minorities are adversely affected than non-minorities, resulting in a de facto integration maintenance policy. In its attempt to prevent harm from falling upon innocent victims by striking down Starrett City's policy, the court uses the anti-discrimination principle to indirectly harm other innocent victims.

The defenders of the court's use of the anti-discrimination principle could reply that this critique of the anti-discrimination approach fails to distinguish race-conscious decisions from race related consequences. Even if the court's decision had adversely affected minorities, that is a very different situation than that brought about by Starrett City's policy. The anti-discrimination principle condemns certain kinds of race-conscious decisions; it does not reject every consequence found to negatively affect a racial minority. In other words, because Starrett City invokes racial categories, its policy deserves condemnation under the anti-discrimination principle. The court merely takes a stand against the use of racial categories that do not benefit racial minorities; it cannot prevent every harmful effect on racial minorities. Thus, it would be condemned under this interpretation of the anti-discrimination principle.

Distinguishing between race-conscious decisions and race related consequences fails to address the court's implication that race-conscious categories should not be used. By rejecting the use of racial categories, the court implies that Starrett City should not use racial categories. Yet, stripping Starrett City of its integration maintenance program amounts to accepting segregated housing.[202] Affirming segregated housing developments in turn yields race-consciousness. The court's decision against Starrett City's policy effectively affirms segregated housing.

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199. Note, *Racial Integration in Urban Public Housing*, *supra* note 9, at 374.

200. *Id.* at 375.

201. *Id.* ("Every benign discriminatory measure which the courts have allowed violates the Act to the same degree—that is, completely.") *Id.*

202. Given that the overwhelming number of applicants on the waiting list are minority members, the numbers indicate that it will only be a matter of time before Starrett City becomes segregated. *See* United States v. Starrett City Assocs., 660 F. Supp. at 672-73 (table setting forth the number and percentage of units Starrett City occupied by each racial and ethnic group from 1975-84).

More importantly, the court's decision not only sanctions segregated housing, it also indirectly encourages the type of segregated housing associated with urban blight. By refusing to explore the possibility that integration maintenance might benefit racial minorities, the court avoids inquiry into the consequences. However, when invoking the anti-discrimination principle, one should assess the use of racial categories in light of consequences. For example, the court claims concern for innocent victims—those minority members denied access to a certain quality of housing.[203] Part of the court's concern for innocent victims is an interest in what will happen to those victims. Actually, the court's decision may have greater adverse consequence than the integration maintenance policy. Integration maintenance enhances rather than negatively affects minority access to quality housing. In contrast, the court's decision makes decent housing for innocent minority occupants and prospective occupants of Starrett City less likely. Hence, the court's position as an advocate of the anti-discrimination principle is undermined by its concern for minorities.

Defenders of the anti-discrimination principle can counter criticisms by distinguishing between types of race-conscious programs. The type of access at stake in housing differs from that in education and employment because it involves nonmeritocratic access issues, whereas education and employment pose meritocratic questions of access. Housing does not take ability or disability into account.[204] Starrett City's race-conscious policy, unlike race-conscious programs in education and employment, does not attempt to compensate for lack of qualifications among members of excluded groups.[205]

While merit plays a role in the education/employment areas, and not in the housing area, this is essentially a distinction without a difference. The meritorious nature of the activity does not determine the applicability of racial categories. In all of these realms — education, employment, and housing — race-conscious programs attempt to compensate for a lack of opportunity. However, are the types of opportunity at stake in education/employment and housing the same?

Some claim that quotas in the education or employment context dif-

203. United States v. Starrett City Assocs., 840 F.2d at 1102.

204. *See* Note, *Racial Integration in Urban Public Housing*, *supra* note 9, at 383.

205. According to one author, "[i]n the employment and educational affirmative action cases courts are primarily concerned with the 'unfair' effects of race-conscious measures on 'innocent victims' who might be better qualified." Recent Developments, *supra* note 11, at 573. On the other hand, "race-conscious housing measures do not suffer from the claims of 'better qualified innocent victims.' " *Id.*

fer from those in housing since "the former are access quotas used to *provide* opportunities to those previously denied of such social goods, the latter *limit* minority access to the very housing sought to be integrated" (emphasis in original).[206] Thus, according to the above distinction, quotas are inextricably linked to discrimination in the housing context.

How one characterizes the social good in question determines whether the above distinction between the uses of the quotas holds. If the public good is described as housing in general, Starrett City's policy denied housing to some applicants who would have otherwise obtained residency at Starrett City. Yet, the distinction between quotas and ceilings blurs when the public or social good is characterized as stable neighborhood housing. The housing quotas then appear more like the quotas in education and employment. The housing quota is used to provide an opportunity for stable neighborhood housing, a social good previously denied to minorities. Therefore, it is quite plausible to claim that Starrett City's policy does not deny minority applicants stable neighborhood housing even if it does, in some sense, deny them housing.

Proponents of the anti-discrimination principle often assert a relationship between the race-conscious program and stigmatization.[207] Accordingly, a "quota limiting the number of blacks in any complex inevitably implies that blacks are undesirable."[208] The government raised a similar concern in *Starrett City*: "[t]he racist notion that blacks and Hispanics possess characteristics that make them unfit tenants is exactly the kind of stereotyped slur that the Equal Protection Clause and the Fair Housing Act cannot tolerate."[209] However, the question remains: does restricting minority access automatically stigmatize?[210]

There are at least two different senses of "stigmatize"— the psychological and the sociological. With respect to the psychological sense, race-conscious policies stigmatize in that they make members of the racial minority feel inferior because the race-conscious policy targets them primarily because of their race and not for other more noble reasons.

206. Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7, at 203.

207. *See, e.g.*, Farrell, *supra* note 170, at 559.

208. *Id.*

209. Brief for Plaintiff-Appellee at 30, n.12, *Starrett City*.

210. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Brown v. Bd. of Educ. 347 U.S. 483, 494 (1954). *See also* Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7, at 211 n.55. The author asserts that "[r]egressive racial quotas simply reinforce racial stereotypes and stigmatic harm, the enduring source of injustice." *Id.* at 226.

Evidence of minority residents of Starrett City feeling psychologically inferior is scant. According to one study, "the great preponderance of black residents" favored Starrett City's racial integration.[211]

Did Starrett City's policy stigmatize in the second, sociological sense, by branding members of the racial minority as less desirable? Here Starrett City's policy appears more vulnerable: for was not its policy's implicit message that racial minorities did not deserve this type of housing because they were less desirable tenants? Starrett City's defense to that assertion would be that it was not stigmatizing the racial minority; rather, its policy signalled a stigmatizing or a rejection of the ghetto. Starrett City rejected the ghetto, not the racial minority. Whether Starrett City's policy stigmatized, in any sense of that word, remains highly questionable.

Overall, the anti-discrimination principle encounters difficulties in drawing a line between acceptable and non-acceptable race-conscious programs. Starrett City's policy simply does not do the kinds of things that the anti-discrimination principle condemns; it does not necessarily negatively affect innocent minority victims (for example, those on the waiting list), nor does Starrett City's policy stigmatize members of a racial minority. Despite theses incongruities, the court seems content to categorize Starrett City's policy as violating the anti-discrimination principle.[212]

IV. ALTERNATIVE PRINCIPLES

While the courts relied on the anti-discrimination principle, the opposing parties advocated color-blindness and pro-integration.

A. *Color-Blindness*

1. *The Principle.* The plaintiffs in *Starrett City*, Reagan and Bush Administration officials, various justices on the Supreme Court, and prominent legal scholars have advocated the principle of color-blindness. Just what is that principle? The elder Justice Harlan, dissenting in *Plessy v. Ferguson*, provided the most often quoted statement of the color-blind position: "Our Constitution is color-blind and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes

211. United States v. Starrett City Assocs., 660 F. Supp at 674-75 (citing Dr. Kenneth Clark's study concerning Starrett City). The study was prepared for the New York State Division of Housing and Community Renewal. *See id.* at 674.

212. *See* United States v. Starrett City Assocs., 840 F.2d at 1101.

no account of his surroundings or of his color. . . ."[213] The Constitution, however, is not color-blind, at least in the sense that it mentions slavery and allows for the differential treatment of slaves.[214] Harlan's statement therefore must mean that the Constitution should be color-blind.

Professor William Van Alstyne, a noted constitutional scholar, proposes the following reason for why the Constitution should be color-blind:

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's life—or in the life and practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor one any more than another for being black or white or brown or red, is wrong.[215]

Accordingly, a justification for using race, even affirmatively, can never arise. Proponents of color-blindness, in contrast to adherents of the anti-discrimination principle,[216] reject the acceptance of any race-conscious policy, even a policy designed to aid racial minorities.

Van Alstyne's justification for color-blindness contains two problems, evidenced in the first phrase of his proposal: "*one* gets beyond racism by getting beyond it *now*" (emphasis mine). The terms he uses raise the questions of who is "one" and when is "now"?

2. *Critique.* To highlight the problems, imagine three scenarios, each with a time line from time t_0 (beginning time) to time t_n (ending time). In Scenario A, race has never been used by anyone from time t_0 to time t_1 (a point between time t_0 and time t_n). Under those conditions, it follows that use of race, even benignly, for example in an affirmative action program, is not justified under a color-blindness principle at time

213. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

214. According to John Arthur:

> Three provisions of the Constitution explicitly recognize the existence of slavery: the three-fifths compromise, which apportioned congressmen on the basis of the number of free persons plus "three fifths of all other persons" (Article I, Section 2); the requirement that the states "deliver up" fugitive slaves (Article IV, Section 2); and the promise that the slave trade would not be outlawed before 1808 (Article I, Section 9). Although the Constitution did not deny that slaves were persons—in fact, it explicitly described them as such in the three-fifths compromise—it nonetheless excluded them from the ranks of "citizen."

J. ARTHUR, THE UNFINISHED CONSTITUTION 212 (1989).

215. *See* Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809-10 (1979).

216. *See supra* text accompanying notes 193-96.

t_1.[217] The benign use of race is precluded by Scenario A's assumption that there has been no negative use of race (*i.e.*, discrimination) that an affirmative use needs to combat.

Scenario B, adopted by color-blind adherents, is only slightly more complex than Scenario A. In Scenario B, some individuals, including the government, used race negatively from time t_0 to time t_1. At time t_1, the government discontinued the negative use of race until time t_2 (*i.e.*, from, t_1 to t_2). These conditions do not justify the use of race by the government at time t_2, because during the time frame, from t_1 to t_2, no negative uses exist for the benign uses to offset. The time line, t_1 to t_2, in Scenario B effectively replicates Scenario A where in the color-blind context, affirmative action looses its force when the government stops discriminating. Notice, however, that the color-blind proponent can not automatically discount the use of race in Scenario B between t_0 and t_1, where a benign use of race could offset the negative use of it.[218]

Scenario C is much more complicated; it does not use linear time lines with clear-cut break points. In Scenario C, no one point delineates when the government uses race in a negative manner and when it ceased to do so. To delineate a sharp cut-off from discriminatory activity indicates an insensitivity to the lingering effects of past racism. Federal housing loan policies may no longer explicitly discriminate on the basis of race,[219] but the inertial effect of past discriminatory policies will infect the composition of our cities and suburbs for some time to come. Being blind to color means being blind to background conditions and ultimately being blind to social reality itself. Scenario C better depicts the housing situation than either of the other two scenarios. The color-blind position assumes the unrealistic situation in Scenario B with a clear-cut temporal break between negative uses of racial categories and no uses. The following should make this abstract discussion more concrete.

The use of racial categories at Starrett City should be evaluated in terms of the background conditions under which they are used. For example, Starrett City must be compared to other housing projects. If Starrett City were the only housing project to employ minority ceilings in a housing market where either all of the other housing units were inte-

217. Note that if race was never used by some but was used by others, that leaves open the possibility of justifying the use of race at t_1 in order to overcome its negative use by certain segments of the population.

218. Note that a problem arises if any spill-over effects exist between the first time frame (t_0 to t_1) and the second (t_1 to t_2).

219. *See supra* note 68 and accompanying text.

grated or where minority segregated projects were comparable in quality to nonminority segregated projects, then Starrett City would have a difficult time justifying its policy. However, in an environment where most of the minority housing projects suffer from deterioration and where nonminority projects comparatively prosper,[220] Starrett City's policies appear less objectionable.

The color-blind position holds only if it remains blind to contextual factors. It unsuccessfully tries to stay blind to the realities of color and race in society. But by condemning wholesale the use of racial categories, the color-blind position commits itself to the rejection of even those uses of racial categories that clearly benefit blacks.

Moreover, the color-blindness advocates' avoidance of questions of redistribution amounts to a pretense. The color-blindness position supports the status quo in terms of distributional patterns. Behind race stand the disparate power relations and the inevitable distribution of public goods. The status quo by its very nature precludes efforts to change these relations and distributions. By refusing to accept redistributional efforts based on race, the color-blind principle drifts quite naturally to the safe haven of the status quo. In the housing context, color-blindness lends support to the quantity and quality of housing that exists or would exist without redistributional schemes like integration maintenance. In most instances, that means that color-blindness supports less decent housing for minorities. In the name of blindness to race and distribution, color-blindness implicitly promotes a housing situation that has a great impact on race and distribution.

B. *Pro-Integration*

1. *Contrasts.* The pro-integration principle stands in sharp contrast to color-blindness principle. Color-blindness adheres to neutrality; the government should not promote its version of the public good. In contrast, the pro-integration position promotes the public good of integration.

Likewise, the pro-integration principle clashes with the anti-discrimination principle. Integration maintenance quota schemes serve primar-

220. Newman's study rated Starrett City superior with respect to crime, schools, and physical conditions to four nearby, overwhelmingly minority developments. Memorandum of Starrett City Tenants' Association, et al. as Amici Curiae in Support of Appellants' Petition for Rehearing and Suggestion of Rehearing En Banc (No. 87-6132) at 10-15 (citing Oscar Newman Aff.) [hereinafter Tenants Association Memorandum]. As a result of the Arthur settlement, 18 other housing projects were identified with fewer than 20% minority occupancy. *Id.* at 6.

ily to promote integration in housing, not to eradicate discrimination in housing.[221] These quotas discriminate against minorities by placing a cap on minority access. This differentiates them from quotas used in the employment or education contexts, which provide for rather than limit, minority access.[222]

The distinction between prohibiting segregation and requiring integration begins to blur in the case of school desegregation. To maintain the distinction one would have to hold that *Green v. County School Board*[223] and *Swann v. Charlotte-Mecklenburg Board of Education*[224] erroneously interpreted *Brown v. Board of Education*.[225] Forbidding school segregation appears an idle gesture without subsequent attempts to integrate the schools.

Similarly, in housing, the anti-discrimination and pro-integration principles move toward a closer symbiotic relationship. Attempting to drive a wedge between the two principles overlooks a distinction between the short and long term effects of an integration maintenance policy. In the short term, integration maintenance does limit some minority access, but, in the long term, the policy's goal includes the eradication of discrimination in housing. The dwindling resource of adequate housing for minorities has discriminatory effects. Access to over eighty, predominantly white, housing projects in New York City is effectively denied to minorities through de facto segregation,[226] and many of the comparable minority housing projects do not provide the benefits of Starrett City.[227]

Starrett City represents a point between these two types of housing projects. Starrett City gives minorities greater access to housing developments than the almost exclusively white housing developments, and Starrett City provides better housing conditions for some minorities than most exclusively minority developments. So, Starrett City's pro-integration position appears compatible with, rather than in stark opposition to,

221. *See* Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7, at 203.

222. *Id.*

223. Green v. County School Bd., 391 U.S. 430 (1968) (invalidating a plan wherein students freely chose their school).

224. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (allowing a quota-type remedy to achieve school desegregation).

225. Brown v. Bd. of Educ., 347 U.S. 483 (1954). *Cf.*, Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7, at 225. The author asserts that *Green* and *Swann* were wrongly decided: "quotas in the education context do not raise the individual rights problem involved when a government agency controls the allocation of housing, a limited good, on the basis of race since all children have access to public education." *Id.* (citation omitted).

226. *See* Hellman, *supra* note 84, at 56.

227. *See infra* text accompanying notes 234-43.

the anti-discrimination principle. This compatibility does not justify pro-integration, but it does undermine the courts' attempts to drive a wedge between the two principles. Before turning to a justification for pro-integration, a few brief remarks might prove helpful.

Pro-integration invokes a straight-forward analysis: separation between the races leads to prejudice. Integration can overcome the fears and suspicions that exist between the races. Society needs to go beyond its concern for discrimination against the individual so that it can promote integrated communities, thereby ending the mistrust between the two groups.[228]

2. *Intrinsic Good.* The virtues of integration may seem obvious. Its value is long recognized in the law; injury to a person's right to live in an integrated society is cognizable under Title VIII.[229]

In addition, the idea of exclusion runs counter to a vision of a human community. Integration appears intertwined with the promotion of the ideals of equality and respect for others.[230]

Yet, integration does not necessarily forge any links to equality and respect. For example, the Boston busing controversy illustrates how the early stages of integration can engender inequality and disrespect.[231] Alternatively, perhaps the long term consequences of integration can serve to justify it.

Few would deny that integration has some value; however, integration does not function as an intrinsic good. An intrinsic good, compared to an instrumental good, has value in itself and not because of or in relationship to some other value.[232] At best, integration may stand as a means to the fulfillment of other values such as equality and respect. Because integration's value is dependent on its relationship to other values, Starrett City mistakenly portrayed integration as an intrinsic good.

228. *See* Kifner, Ruling Threatens Starrett City's Dream, N.Y. Times, Nov. 14, 1988, at B1, col.2; Rosenberg, *Starrett City's Sound Racial Policy*, N.Y. Times, Feb. 20, 1988, at C3, col.1.

229. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (upholding the standing of white occupants in an action against an apartment complex for refusing to rent to minorities); Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979); and Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (fair housing organizations and "testers" who receive false information may sue housing providers for violations of the Fair Housing Act).

230. Judge Newman's dissenting pro-integration position has been bitterly attacked: "Even an equalitarian-minded judge can inadvertently achieve racist consequences by basing a facially non-racist argument, which sacrifices racial equality for some other end, on tipping point reasoning." Current Issues, *supra* note 44, at 31.

231. *See generally* J. LUKAS, *supra* note 4.

232. *See* Olson, *The Good*, in 3 ENCYCLOPEDIA OF PHILOSOPHY 367 (1967).

To conceive of the problem with integration as an intrinsic good in another manner, consider the following questions. What intrinsic value flows from integration? Do humans become more fulfilled by virtue of their participation in integrated communities? Can humans become equally fulfilled under non-integration conditions? Does integration have any negative implications? Given the difficulty of constructing uncontested answers and despite the initial lure, integration does not sit in a higher privileged position relative to other public goods. Perhaps a consequential analysis can place integration on firmer footing.

3. *Consequences.* Although some undesirable consequences may flow from integration, the benefits of integration seem to far outweigh the costs. The proponents of Starrett City can point to many beneficial results of its integration maintenance policy. An appreciation of Starrett City's success, in part, evolves from knowing the circumstances under which Starrett grew. The following is how the developers saw these circumstances:

> The bordering area of East New York was predominantly black, plagued by crime and vandalism, and rife with abandoned buildings. A large junkyard was across the street to the north, and a foul-smelling garbage dump lay to the south. A water pollution control plant was on the east, and the development was separated from Canarsie to the west by an unbridged and frequently stagnant creek. In addition, the development lay in the flight path of planes approaching and departing Kennedy Airport. . . [T]he only available public transportation was slow and costly, requiring two fares and a subway ride through high-crime areas.[233]

Starrett City arose in an area that did not lend itself to success for a housing project. Yet Starrett City "is one of the most successful examples in the nation of racial integration in housing,"[234] as well as being "perhaps the most integrated area of" New York City.[235] Crime rates remain markedly lower in Starrett City than the surrounding areas. According to a 1985 Pennsylvania State University study, Starrett City qualified as one of the safest places to live in the United States, despite its location in the 75th Precinct, which had one of the New York City's highest crime rates.[236] Oscar Newman conducted a study of Starrett

233. Brief for Defendants-Appellants at 9, *Starrett City* (citing, Rosenberg Aff.).

234. United States v. Starrett City Assocs., 840 F.2d at 1103 (Newman,J., dissenting). *See also* Prial, *Starrett City: 20,000 Tenants, Few Complaints*, N.Y. Times Dec. 10, 1984, at B1, col.1 (noting that "[d]isgruntled tenants are as scarce as Starrett City has potholes in its well kept streets.").

235. Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7, at 232 n.149.

236. *See* Hellman, *supra* note 84, at 56.

City and four nearby housing projects that had tipped in the 1970s.[237] He found that Starrett City's crime rate fell appreciably below those of the other four projects.[238]

Moreover, Starrett City's integrated schools ranked among the top-performing schools in New York City.[239] In the complex itself, Starrett City's managers maintained racial balance not only in each building but also on each floor.[240] Starrett City contains "a shopping center, eight garages, its own power plant, a clubhouse, gymnasiums, saunas, squash and tennis courts, recreation rooms, two indoor swimming pools, a nursery and two schools."[241] It can further boast of 46 civic associations, its own cable television station, and a private armed police force, complete with German shepherds.[242] The educational level of nonwhites at Starrett City kept even with that of white tenants, while nonwhites had higher median earnings than whites.[243] Forty percent of the white tenants and twenty-six percent of the nonwhite tenants received rent subsidies.[244] Minority tenants resided at Starrett City longer than whites.[245]

The beneficial consequences of Starrett City's integration maintenance policy appears to be holding steady, but the court's decision and the resulting demographic changes may undermine the gains. In 1988 the waiting list numbered 18,000, whereas in 1985 it held at 6,000.[246] As of August 20, 1990 Starrett City had 59% of its units occupied by whites and 41% by minorities. In 1989, 250 whites, 57 African-Americans, 21 Hispanics, and 29 Asians vacated their units. Currently, there is a waiting list of 6,482 and "[o]f the people undergoing approval for apartments, more than 90% are minority."[247]

Overall, the benefits of integration may seem too obvious to bear repeating. Integration promotes equality, increases minority achievement, diminishes prejudice, and broadens horizons. Yet, the initially ob-

237. Tenants Association Memorandum, *supra* note 220, at 10 (citing Oscar Newman Aff.).

238. *Id.* (citing Oscar Newman Aff.)

239. *See* Hellman, *supra* note 84, at 55.

240. *Id.*

241. Brief for Plaintiff-Appellee at 4, *Starrett City.*

242. Kifner, *Ruling Threatens Starrett City's Dream*, N.Y. Times Nov. 14, 1988, at B1, col. 2.

243. United States v. Starrett City Assocs., 660 F. Supp. at 675 (citing study by Dr. Kenneth Clark).

244. *Id.* The Court of Appeals found this heavy subsidization of white tenants further evidenced Starrett City's disregard for the Act. *Id.* at 678. An alternative interpretation is that it demonstrates the lengths to which developers will go to create a stable integrated housing project.

245. *Id.* at 675.

246. Finder, *Starrett City Will Stop Using Quotas to Foster Integration*, N.Y. Times, Nov. 8, 1988, at B4, col. 1.

247. Telephone interview, *supra* note 162.

vious benefits do not readily withstand a closer examination. Farrell challenges the purported benefits of integration in the context of school integration.[248] He asks whether integration actually promotes equality. In integrated schools, blacks may suffer disproportionately.[249] Furthermore, Farrell contends that blacks may do worse at integrated schools than at segregated ones.[250] Integration may actually increase prejudice by instilling racist attitudes that may not have been present before the implementation of integration.[251]

Similar charges do not hold against Starrett City's integration policy. Overall, minority occupants at Starrett City only indicate their satisfaction with conditions at Starrett City.[252] Conditions at Starrett City schools, for example, appear exemplary and nonminorities attest to the positive effects of living in Starrett City on racial issues.[253] So, it seems integration yields some definite benefits, at least, in the case of Starrett City.

4. *The Pragmatic White Shield.* The benefits derived from Starrett City's pro-integration policy, at least in part, flow from the infrastructural support the development receives as a result of the presence of whites. For example, the benefits from Starrett City's integrated school partially stem from the white and oriental students at Starrett City raising the average level of performance.[254] Thus, the justification for a pro-integration position comes down to adopting a strong, pragmatic, and far from palatable claim; the white students in Starrett's schools serve, in effect and in part, as a shield for the black students. Professor Kaplan employed the powerful and disturbing metaphor of a white shield:

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248. *See* Farrell, *supra* note 170, at 553.

249. Counter to Brown v. Bd. of Educ., 347 U.S. 483 (1954), separate is not inherently unequal even in the school context: "[i]ntegrated education is hardly equal when inherent racism causes disproportionate number of disciplinary actions and expulsions against black students in integrated schools." *Id.* at 589.

250. Farrell asserts that "there is substantial evidence that integrated schools provide little, if any, educational benefit to black children, and that they can, in fact, promote stress." *Id.* at 590. (citation omitted).

251. *See id.* at 591. Farrell contends "[i]ntegration is neither a necessary nor a sufficient condition to diminish prejudice." *Id.* at 592.

252. *See supra* note 211 and accompanying text.

253. *Id.*

254. According to the Starrett City Tenants' Association Amici Curiae Brief, "[t]he consistent and substantial differences in achievement [among black students at Starrett City and black students at Public School 306] reflected above show that it is not just white and oriental students at Starrett City who are raising the average performance level . . . ." Brief for the Starrett City Tenants' Association, et. al., as Amici Curiae in Support of the Petition for a Writ of Certiorari, at 13-14.

> [T]he biased community can more easily discriminate against Negroes who are all concentrated in one area. At least until very recently, Negro areas traditionally received far less adequate governmental services—maintenance, police protection, etc.—than did the rest of the city. Integration thus protects the Negro by surrounding him with a shield of whites whom the community, presumably, is less willing to short-change.[255] (citation omitted).

Integration thus acts as a white shield, providing blacks with access to resources routinely made available to whites; it does not constitute an intrinsic good. There is nothing per se valuable about blacks living next to whites. Living in an all black community could be just as rewarding and beneficial as living in an all white community. However, except for some instances, placing blacks in exclusively minority housing areas condemns them to unfavorable living conditions.

Unfortunately, Starrett City works not because of the integration, but because an integrated development (and not a development with only racial minorities) can still command sufficient resources to survive. Tipping would be irrelevant if resources necessary to maintain and improve the infrastructure, schools, etc., could be guaranteed for an all members of racial minorities at Starrett City.[256] But the chances of adequate infrastructure support remain rather slim, since the white shield protects a certain level of resource support. When whites flee, they take resources with them. Within the context of the social restraints under which Starrett City must operate, its integration maintenance policy can be only pragmatically justified; it is a means of insuring infrastructural support, not a means for promoting equality of opportunity and treatment.

V. REDISTRIBUTION AND ANTI-SUBJUGATION

A. *Context*

The anti-discrimination, color-blind, and pro-integration principles all fail to directly confront social reality. Color-blindness chooses to remain blind to the structural and temporally persistent features of racism. The anti-discrimination principle ignores the contextual complexities and results of race-conscious remedies such as Starrett City's integration maintenance. Pro-integration builds walls, literally and figuratively, to keep out the more sinister aspects of the surrounding social reality.

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255. *See* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966).

256. *See* Newman, *supra* note 161, at 195-96 (finding an inverse correlation between black occupancy and political support for public housing).

B. *Redistribution*

The debate over the three principles masks a more fundamental issue than contextual insensitivity. Each principle contains a largely hidden redistributional implication. Color-blindness makes little or no room for any redistribution of public goods. Adherents of color-blindness accept the current distribution patterns whatever the nature of the public good—employment, education, or housing. In accepting some forms of affirmative action, the anti-discrimination principle allows some degree of redistribution. Integration, by going beyond the affirmative action programs found acceptable within the anti-discrimination position, promotes the greatest degree of redistribution of the three competing principles.

Interestingly, the debate over these principles is seldom cast in terms of the redistribution issue. Instead, the choice between these competing principles is formulated in terms of abstract criteria, such as promotion of equal treatment, thereby not confronting the truly difficult questions of redistribution.

The importance of these redistributional implications is exemplified by an analysis of the term "fair" in "fair housing," contained in the Fair Housing Act.[257] In general, "fair" has two types of meanings: formal and substantive. In the formal sense, "fair" refers to the nature of the procedures. Accordingly, the procedures should avoid bias so that everyone has an equal opportunity to obtain housing. The formal interpretation is weakened by the fact that fair procedures can yield highly unjust results. If minorities have a fair opportunity to rent housing but the available stock of housing and economic conditions for renting limit the rentals to only highly inferior housing, then the fair procedures are ineffective.

In contrast to the formal interpretation of "fair housing," the substantive sense places a definite value on the public good. Substantively, "fair housing" means decent, comparable, and good housing. The substantive interpretation does not entail a guarantee of a certain dwelling, but it does devise a measure that compares the housing situations of groups, not of individuals. The substantive interpretation looks at various social groups and the disparity between the group's enjoyment of the public good. If wide disparity between groups persists in the fulfillment of the public good, then in the substantive sense, this disparity is unfair. If inadequate housing or lack of housing disproportionately burdens a

257. 42 U.S.C. §§ 3601-19, 3631 (1988 & Supp. 1989).

certain group, particularly an already disadvantaged group, such as blacks, substantive unfairness exists.

Notice that a substantive interpretation of "fairness" has shifted the terms of the debate. The principles of color-blindness and anti-discrimination focus on the treatment of individuals; the substantive interpretation redirects the focus to the treatment of groups. The integration principle leans heavily toward a group analysis; however, the integration principle's solution to a group's redistributional issues remains constant: integration.

The integration principle works only in light of certain contextual factors. Contextual sensitivity constitutes both its strength and its weakness. The contextual factors make Starrett City's integration maintenance plan understandable and, within certain limits, defensible. In the context of the social realities confronting a housing development such as Starrett City, it had little choice other than to adopt an integration maintenance policy. In the next section, this Article will address these contextual conditions in light of a different principle, anti-subjugation.

C. *The Anti-Subjugation Principle*

The anti-subjugation principle is compatible with a substantive interpretation of fairness and provides a powerful means for assessing the contextual conditions. Subjugation involves the unfair distributional patterns of public goods to disadvantaged groups.[258] This formulation of the anti-subjugation principle condemns distributional patterns which adversely affect disadvantaged groups and explicitly addresses the problem of distribution.[259]

Individuals become subjugated, in part, due to their group membership.[260] Because of institutional structures and other factors, some

258. See Young, *Displacing the Distributive Paradigm*, in JUSTICE AND THE POLITICS OF DIFFERENCE (1990) for a survey of various distributive justice definitions.

259. Other recent formulations have not incorporated an explicit reference to redistribution. For example, Lawrence Tribe, in his analysis of the Equal Protection clause, characterizes the anti-subjugation principle as one "which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515 (2d ed. 1988). Anti-subjugation (or, what Ruth Colker calls, anti-subordination), holds that "it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole." Colker, *Anti-Discrimination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986). If subordination includes the unfair pattern of the distribution of decent housing to African-Americans, then Tribe and Colker are in agreement with the formulation in the text.

260. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 158 (1990) (discussing what groups should constitutionally qualify as disadvantaged, *i.e.*, as suspect classes).

groups obtain fewer resources than others and receive a disproportionate share of public goods. Racism constitutes one of the most pernicious forms of subjugation. The anti-subjugation principle attacks racism at its structural roots and not at the symptomatic level of individual treatment. It exposes the institutional structures responsible for the unfair distribution of resources such as housing.

The anti-subjugation principle[261] sheds new light on tipping. Previously, this Article argued for the legitimacy of the tipping phenomenon on the grounds that white flight could not be solely attributed to discriminatory attitudes.[262] Other factors, such as the threat of urban blight, contribute to white flight. However, accepting the reality of urban blight and its connection with concentrations of racial minorities does not thereby purge the tipping issue of racism. The connection between urban blight and racial concentration only holds given racist structures leading to that connection. Tipping may not correlate directly with racist attitudes, but it relies on racist structures. Whites, not blacks, generally have the means to engage in flight from urban blight. That fact holds irrespective of white attitudes.

Why should blacks have to grovel for the shield of integration in order to get decent housing? Starrett City's success constitutes society's failure. Again, Kaplan forcefully captures the essence of this concern: "[i]n common speech the benign quota is an upper limit on something desirable—we do not speak of benign quotas of the number of Negroes in slums but rather of the number in desirable housing."[263]

What of a ceiling on blacks in ghettoes? That would be a ceiling perfectly in keeping with the anti-subjugation principle. Ceilings, such as those used in integration maintenance programs, place a limit on a desirable item, a public good. The anti-subjugation principle highlights the irony that minorities, in many cases, can achieve access to public goods only by having their access limited.

The anti-subjugation principle sheds light on the other principles, as well. In the case of color-blindness, an anti-subjugation perspective helps explain the historical ambiguities of the color-blindness principle. Depending on the context, color-blindness can have subjugating or liberating affects. When representing the school children in *Brown*,[264]

261. For development of the anti-subjugation or anti-subordination principle in the context of constitutional law, see Colker, *supra* note 259.

262. *See* text accompanying notes 162-70.

263. *See* Kaplan, *supra* note 255.

264. Brown v. Bd. of Educ., 347 U.S. 483, 484 (1954).

Thurgood Marshall argued against the separate but equal principle of *Plessy*[265] and in favor of color-blindness. He argued for color-blindness to be put into the service of redistributing educational benefits to Negroes.[266] Today, color-blindness ideals can act as an obstacle to redistributional programs. For example, the Supreme Court, in the name of color-blindness, ruled against the redistributional set-aside program in *Croson*.[267] Justice Marshall issued a vehement dissent[268] that represented his adoption of the anti-subjugation principle.[269]

The anti-subjugation principle pushes the anti-discrimination principle to a deeper level. An anti-discrimination analysis focuses on the consequences of the programs, not the contextual details. Because integration maintenance programs limit minority access, they thereby qualify for condemnation by the anti-discrimination principle. In contrast, the anti-subjugation principle focuses more on context. Applying an anti-subjugation approach to the anti-discrimination principle results in an emphasis on the subjugating affects of integration maintenance on minorities as a group rather than on how the treatment affects individuals.

Finally, adoption of the anti-subjugation moves the pro-integration position toward a more consequential direction. The pro-integration principle, as exemplified by Starrett City's approach, relies on a weakly supported premise that integration constitutes an intrinsic good. The integration principle therefore supports integrated housing projects even in the hypothetical case where segregated minority housing proves far superior to the integrated variety. Because the anti-subjugation principle looks to the benefits accorded to minorities by the different schemes and not to the schemes themselves, it encourages adherents of the pro-integration position to more honestly appraise the benefits of integration.

In sum, the anti-subjugation principle can result in redistributional and thus more defensible versions of the principles examined in this Article. Each principle is highly malleable. Despite their abstract formulations, they remain deeply dependent upon particular contextual factors. Only the anti-subjugation principle explicitly evaluates the contextual factors themselves.

Contextually, Starrett City's policy is justified only in a limited sense

265. Plessy v. Ferguson, 163 U.S. 537 (1896).

266. *See* Brown, 347 U.S. at 488.

267. Richmond v. Croson, 488 U.S. 469 (1989).

268. *Id.* at 538 (Marshall, J., dissenting).

269. *See* Recent Developments, *supra* note 11, at 573 n.59.

under the anti-subjugation principle. Starrett City's policy does not subjugate racial minorities given current housing conditions. However, those conditions do subjugate racial minorities because it appears that minorities can only obtain decent housing through integration maintenance policies. Yet Starrett City's policy counters the subjugation of blacks by providing relatively stable housing otherwise less available. It is unfortunate that a case can be made for the need of minority ceilings such as the one used by Starrett City in today's world.

The courts, by themselves, cannot change social conditions in a way that assures that there will be no more need for integration maintenance programs. Legislators, along with "we the people," need to take the challenges issued by the anti-subjugation principle very seriously. The courts can, however, provide coherence to vague pieces of legislation such as the Fair Housing Act by reconciling its apparent conflicts between the principles of anti-discrimination color-blindness, and pro-integration in favor of the more fundamental and more justifiable principle of anti-subjugation. Whatever else lies behind the Act, the Act surely was meant to dissipate the forces of subjugation.

CONCLUSION

Housing, "the last major frontier in civil rights,"[270] receives scant litigation attention when compared to other civil rights issues such as education or employment.[271] For example, after the momentous 1954 *Brown v. Board of Education*[272] decision, education became the first and foremost focus of civil rights litigation.[273] The passage of Title VII of the Civil Rights Act of 1964,[274] added the area of employment to the civil rights agenda. However, despite the passage of the Fair Housing Act of 1968 (Act),[275] housing has lagged behind education and employment, particularly in terms of implementing the legislation.

270. Note, *The Legality of Race-Conscious Access Quotas Under the Fair Housing Act of 1968*, 9 CARDOZO L. REV. 1053, (1988) (quoting R. SCHWEMM, HOUSING DISCRIMINATION LAW 3 (Supp. 1986) (quoting Lamb, Equal Housing Opportunity in IMPLEMENTING OF CIVIL RIGHTS POLICY 148 (C. Bullock & C. Lamb eds., 1984)).

271. *See* Note, *The Legality of Integration Maintenance Quotas*, *supra* note 7 at 198.

272. 347 U.S. 483 (1954).

273. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Green v. County School Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Although activists sometimes assume that schools are the logical place to begin the battle against racism, perhaps the amount the litigation directed at schools, as well as the litigation obstacles presented by the composition of schools make housing a better target.

274. 42 U.S.C. §§ 2000e-17 (1988).

275. 42 U.S.C. § 3604 (1988).

Yet housing occupies a pivotal position vis-a-vis education and employment.[276] Residential segregation can quickly undo highly intrusive educational desegregation plans. Furthermore, the seemingly intractable nature of segregation in housing can offset gains in countering discrimination in education and employment.[277] Any attempt to eliminate discrimination will fall short unless it makes concerted efforts to counter housing discrimination. Where and how people live does a great deal to help define who they are.

There is an old adage to the effect that if you study a leaf long enough and thoroughly enough, you will understand the world. This Article does not unravel the mysteries of the world, or even the mysteries of housing and race in this country. However, a detailed look at the microcosm can provide some insights into the social world at large. Starrett City's policy poses a paradox: how can an ennobling experiment in integration demean by discriminating at the same time? *Starrett City*, in some sense, represents the conflicts of certain segments of white society in dealing with racism. On the one hand, whites want to "do something" about racism. While on the other hand, whites refuse to confront the deep structures of racism, preferring to deal with racism within carefully constructed walls, rather than providing the infrastructure support systems needed to attain and retain decent and affordable housing for minorities. Unless we explicitly confront the forces of subjugation and work directly to improve the lot of the disadvantaged, the contradictory strain of *Starrett City* will continue to disturb us.

Morley concludes his analysis of *Starrett City* with the observation that "if Starrett City proves anything, it proves that we can do worse than to start building on a garbage dump."[278] But can't we do better than to build fragile structures on the garbage heaps of racism?

276. *See* Hankins, *The Constitutional Implications of Residential Segregation and School Segregation—To Boldly Go Where Few Courts Have Gone*, 30 How. L.J. 773 (1987).

277. During the floor debates on the Fair Housing Act of 1968, Senator Mondale stated:

> The barriers of housing discrimination stifle hope and achievement, and promote rage and despair; they tell the Negro citizen trapped in an urban slum there is no escape, that even were he able to get a decent education and a good job, he would still not have the freedom other Americans enjoy to choose where he and his family will live.

114 CONG. REC. 2, 274 (1968) (statement of Sen. Mondale).

278. *Double Reverse Discrimination*, *supra* note 1, at 18.